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Nos. 514 and 530.

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1937.

THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION,

Appellants,

vs.

PAN AMERICAN PETROLEUM CORPORATION ET AL.,

Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF LOUISIANA.

THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION,

Appellants,

vs.

HUMBLE OIL & REFINING COMPANY, ET AL.,

Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF TEXAS.

BRIEF FOR APPELLEES

VOL. II.

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PART II.

CIRCUMSTANCES OF THE INDIVIDUAL CASES.

The purpose of this part of the brief for appellees is to set forth the details of the circumstances in the nine individual cases comprehended in these appeals, reviewing the evidence pertaining to the Commission's specific findings.

The further purpose of this part is to review the evidence, and point out the lack of evidence, of any circumstances or conditions that would indicate substantial interference or interruption in the conventional work of spotting; and further to develop that all of the evidence tends to establish the reasonableness and lawfulness of the allowances to the appellees.

Necessarily, this part is somewhat repetitious due to the effort to make complete in itself each of the sections dealing with the several individual industries.

Standard Oil Company of Louisiana.

No. 331 in the court below and No. 514 on appeal.

The first of the petitions filed in any of these cases, in point of time, was that of the Standard Oil Company of Louisiana, and this was the first case in which interlocutory injunction was granted.

This industry is covered by the fifth supplemental report, 209 I. C. C. 68 (R. 107)

TARIFFS PROVIDING FOR ALLOWANCE.

The refinery is located at North Baton Rouge, Louisiana, served principally by the Yazoo & Mississippi Valley Railroad Company and also by the Louisiana & Arkansas Railroad. The allowance, condemned by the Commission's order, is $1.20 per loaded car and is provided in a published tariff (R. 723) reading as follows:

"(R) TERMINAL ALLOWANCES
to the
STANDARD OIL COMPANY OF LOUISIANA
at North Baton Rouge, La.

On traffic to and from points on or reached via The Yazoo and Mississippi Valley Railroad Company or connections.

On all carload shipments (including trap cars containing 10,000 pounds or more of less-carload freight) destined to or coming from the plant of the Standard Oil Company of Louisiana at North Baton Rouge, La., the terminal switching service is performed by the Standard Oil Company of Louisiana for account of The Yazoo and Mississippi Valley Railroad Company. Such terminal switching service, for which this allowance is made, consists of the handling of the cars between the point of interchange of such cars with this Company and the point at which such cars are unloaded, or the point at which such cars are loaded in said plant.

For such terminal service performed for The Yazoo and Mississippi Valley Railroad Company by the Standard Oil Company of Louisiana at North Baton Rouge, La., the Standard Oil Company of Louisiana will be allowed $1.20 per loaded car, which will include the handling of the empty cars in the reverse direction.

This allowance is not in excess of the average actual cost of the service as disclosed in a joint study of the operations of the plant facility made during period, March 11, 1927, to March 17, 1927, inclusive, and filed with the Interstate Commerce Commission.

(R) Reduction."

The tariffs of defendants, Louisiana & Arkansas Railway Company and New Orleans, Texas & Mexico Railway Company, providing for this allowance were and are in similar form, although not identical in language.

ANSWER OF RESPONDENT RAILROAD.

Before discussing the facts in support of the allegations in the bill of complaint that there is no evidence upon which the Commission could make certain specific findings of fact, we direct the Court's attention to the answer of the defendant, The Yazoo & Mississippi Valley Railroad Company, in which it admits that its duly pub-

lished rates and charges for the transportation of property to and from plaintiff's (appellee's) plant at North Baton Rouge, Louisiana, contemplate the receipt and delivery at said plant of the property so transported; that plaintiff demanded that the defendant perform the service of transporting empty and loaded cars between its interchange tracks and the points of loading and unloading at plaintiff's plant; and that in lieu of performing said service the defendant elected to have the plaintiff perform the said transfer service, for which it duly published and provided an allowance to the plaintiff.[23] (R. 145)

THE RECORD RELATING TO NORTH BATON ROUGE REFINERY.

The entire record of evidence received by the Commission in relation to the plaintiff's refinery at North Baton Rouge, Louisiana, was made at the sessions held by the Commission at New Orleans, on May 11 and 12, 1932, and will be found in volumes 5 and 6 of the printed record of testimony.

It comprises testimony of the following witnesses only:

R. W. J. Flynn, Traffic Manager for plaintiff, whose testimony begins on R. 213;

W. W. Cunningham, Trainmaster, Vicksburg District, Illinois Central Railroad, whose testimony begins on R. 226;

W. B. Higgins, Traveling Auditor, Illinois Central Railroad, whose testimony begins on R. 236.

J. L. Sheppard, General Freight Agent, Illinois Central Railroad, appearing on R. 236;

C. D. Lunday, Vice President, Louisiana & Arkansas Ry., recalled, R. 231;

[23] The language of the answer is in part quoted below, page 96.

L. A. David, Asst. General Manager, New Orleans, Texas & Mexico Railway, beginning on R. 232;

P. H. Coon, Asst. General Freight Agent, same carrier, beginning on R. 239.

The only exhibits received in evidence by the Commission relating particularly to the plaintiff's refinery at North Baton Rouge, were Exhibits Nos. A-37 and A-38, being maps of the refinery, (interleaved between R. 356 and Nos. A-39 and A-40) certain contracts and correspondence. (R. 356, *et seq.*)

CONTENTIONS IN BRIEF FOR APPELLANTS.

The Baton Rouge refinery of Standard Oil Company of Louisiana is dealt with particularly in the brief for appellants on pages 80 to 88. Appellants do not point out any support for the necessary findings which the Commission would have to make to justify its order, but reiterate in detail what the report states. They dwell upon the large size of this plant, the heavy volume of its traffic and the extensive track facilities (p. 81, *et seq.*). They lay emphasis upon the constant use of an engine, a fact due to volume of traffic, and mention such matters as necessity for spark arresters (p. 82). It is claimed that some adjustment of curves would be necessary if the work were done by carrier engines, (pp. 83-84) when the fact is that the carrier happens to have not only large power in that vicinity but has available elsewhere ordinary switching engines which could make the tracks in this refinery.

We submit that these facts are immaterial to the question of the extent of the carrier's obligation and, although record references are set forth in appellants' brief of evidence purporting to support their contentions, neverthe-

less that evidence does not support a cease and desist order, as will be seen from the following review:

MANY ERRONEOUS FEATURES OF COMMISSION REPORT.

The Commission's fifth supplemental report deals with the situation at appellee's plant. (R. 107) There are ten features of the report, either findings of fact or statements of conclusions of fact, which are contrary to the evidence and as to which findings by the Commission there is no substantial testimony in support thereof. These features are:

LOCATION OF SO-CALLED INTERCHANGE YARDS.

1. The Commission states (R. 108), page 69 of the printed report:

> "The Y. & M. V. main line traverses the property almost parallel with the L. & A. but on the west or opposite side of the refinery, *and two interchange yards located on the industrial property are used.*"

The error of the Commission lies in the italicised portion of the quotation. The interchanges are on the right-of-way of The Yazoo and Mississippi Valley Railroad. No interchange facilities between the railroads and the industry are in use, except on these rights of way. (R. 215)

Exhibit A-37, a map of the plant of the plaintiff, (R. 214, 356), was filed at the hearing and the witness carefully pointed out that the interchange with the Louisiana & Arkansas and the Y. & M. V. is performed on railroad right of way. (R. 214)

This was confirmed by Trainmaster Cunningham of the Y. & M. V. (R. 226) and Vice-President Lunday of the Louisiana & Arkansas.

It is clear from the record that the interchange tracks are on the right-of-way of the railroads and that it is impossible for the industry to obtain possession of the cars on these interchange tracks without trespassing on the property of the railroad companies.

THE REQUEST FOR SERVICE OR ALLOWANCE.

2. There was no evidence upon which the Commission could find, (R. 109, page 70 of printed report):

> "In 1924, the industry requested that respondents perform the spotting service, but *the real purpose of the request, as* understood by respondents and *as shown by the record, was to obtain an allowance for the performance of that service.*" (*Our italics.*)

Mr. Flynn, Traffic Manager for the industry, testified (Or. Tr. 5179-80):

> "The industry predicated its prayer upon asking the carrier to perform its lawful obligation, we made no request for any allowance. * * * We never discussed an allowance."

The printed record reports the witness as testifying (R. 215):

> "We asked the carriers to perform the service in view of the fact that they are obligated to do so under the law."

Notwithstanding Director Bartel repeatedly asked whether the whole purpose of the request for service was to force an allowance from the carrier and not to secure service, Mr. Flynn's testimony stands uncontradicted on that point. (R. 221)

Mr. Flynn was present when the negotiations for service by the carrier were conducted and he states positively that the President of the Standard Oil Company

did not state that the allowance was what was wanted in the first place. (R. 221)

The attorney for the Commission put in the record as Exhibit A-40, copies of letters, memoranda and correspondence made from the files of the carriers. This exhibit was offered

> "not for the purpose of giving any weight to the question of the law that is raised; that is, whether or not it is the common carrier duty to enter upon the plant tracks and perform the described service. I am offering these merely as information to the Commission of the circumstances that led up to a change in the practice which finally was done." (Or. Tr. 5254)

Exhibit A-40 was received solely for the purpose stated by the Commission's attorney. (Or. Tr. 5256) It was wholly incompetent as offered, and would have been excluded in any court. The formal objection thereto should have been sustained.

There is nothing either in Exhibit A-40 or in the transcript of record upon which the Commission could find that the real purpose of the request that respondents perform the switching service was "to obtain an allowance for the performance of that service." If there had been such a purpose, there is nothing unlawful about it, since the statute authorizes the payment of an allowance for service, the enactment being made specifically at the request of the Commission.

AS TO NEED FOR COORDINATION.

3. There was no evidence upon which the Commission could find, (R. 109, page 71 of reported decision):

> "Any operation not under plant management and control would be impracticable and would not be permitted by the industry."

The evidence is clear that the customary carrier operation of switching at a plant where two carriers' tracks reach the plant is for such carriers to agree upon a method of service, either jointly or at the convenience of each.

In Shreveport, Louisiana, at a similar refinery jointly reached by the Louisiana & Arkansas and the Cotton Belt, all the switching service is performed by the Louisiana & Arkansas at a cost of $1.7379 per car. (R. 232)

Witness Cunningham, trainmaster of The Yazoo and Mississippi Valley, when asked whether he could render the same service to the industry as now performed by it with its own power without interference or delay, said:

> "I don't think there is any service in the transportation scheme that we couldn't perform. * * * There might be some slight adjustments of the tracks that would be necessary, as Mr. Flynn has stated, and there might be some minor delays, as Mr. Flynn stated, * * * there probably would be some delay to our power and there might be some delay to the plant in the performance, but I imagine that happens the same way with their own equipment and power handling it now." (Or. Tr. 5210)

The Y. & M. V. switches the Shell Petroleum Corporation's plant at Norco, La., (a refinery located between Baton Rouge and New Orleans on the tracks of the Y. & M. V. where intraplant switching is performed by the industry). (R. 182, *et seq.*)

The Yazoo and Mississippi Valley switches that plant all the time. As stated by Mr. Cunningham, the service at Norco and at the Standard Oil Company of Louisiana's plant "is practically the same—along the same lines any way." (R. 230; Or. Tr. 5217)

The service given by the Y. & M. V. to the Standard

Oil plant is "just about the service we would give anybody." (R. 230)

Mr. Flynn testified as to operation by the two carriers, that it would be easy by yard dispatching,—a feasible plan,—for the Louisiana and Arkansas to come in from one side and the Y. & M. V. from the other side, and switch the plant without interference. There is no place in the United States where two or more carriers switch a plant without coordination between carriers and industry. (R. 220)

The general custom throughout the industrial area contemplates the coming in of railroads on industry property and performing switching in accord with preliminary arrangements made in advance as to where and when each does work. This is a matter of conventional agreement. (R. 220)

AS TO ALLEGED INTERFERENCE.

4. There is no testimony upon which the Commission could find, (R. 109), page 71 of reported decision:

> "A witness for the industry testified that it would be satisfactory to the industry for the carriers to perform the spotting, 'but they would do it under our jurisdiction while they are in the refinery area,' *which means that the work could not be performed except at the industry's convenience.* This witness admitted that should the carriers attempt to serve the industry without unified control *an impossible situation would be created by reason of interference with plant operation.* Further, respondents would be obligated to assume all liability for damage to the plant while their locomotives were operating therein, *which is contrary to the usual provisions of carriers' sidetrack agreements.*"

The so-called admission of Witness Flynn referred to in this report is contained in the record. (Or. Tr. 5191)

The question of the Examiner was not based on the carriers' attempt to serve the industry without unified control.

We quote the condensed narrative statement of this testimony, appearing on p. 218 of the printed record:

> "Two carriers serve our plant direct and two indirectly through traffic agreement. If the two carriers, L. & A. and the Y. & M. V., should enter the plant there would be no interference with our plant operations, but if all four carriers were to attempt to perform the switching within our plant there most assuredly would be interference with our plant operations. It would be an impossible situation. As to whether the L. & A. and Y. & M. V., serving our plant from opposite sides, could perform the switching within the plant, it could be done—it is not absolutely impossible, but it certainly is not the best way to do it and it is not good railway practice. As far as we are concerned the railroads could come in and do the switching, but they would have to do it under our jurisdiction while they are in the refinery area, that is, we would tell them where they were required to switch to and from, and the crew and the engine would be under our control." (R. 218)

It will be noted that the statement of the Commission is a garbled reference to the above quoted testimony, and affords no basis whatever for any finding that the work could not be performed except at the sole convenience of the industry. The conclusion is an attempt on the part of the author of the Commission's report to bolster up its conclusion that the allowance to the industry should be discontinued. Likewise the reference to liability for damage at the plant while locomotives were operating therein is another instance of an attempt to color the situation in support of the Commission's conclusion.

The average number of *intraplant* moves daily in the

Standard Oil Company's plant is only 5¾ cars, made up principally of compartment tank cars, carrying different commodities in each compartment. (R. 216)

There are 47 loading and unloading districts within the plant with a total capacity of 498 simultaneous loadings or unloadings. (R. 218)

It is absurd to say on this evidence that an impossible situation would be created by reason of interference between the handling of inbound and outbound loaded cars and the daily intraplant movement over a 24-hour period of only 5¾ cars. If the carriers wish to perform the service, it is all right with the Standard Oil Company of Louisiana. (R. 216)

There would be no necessary interference with plant operations if carriers were to enter the plant. (R. 218)

Mr. Flynn testified: Carrier power may enter the Standard Oil Company of Louisiana's plant "under usual conditions under which they enter the plants of any other industries." (R. 224)

The industry expects the carrier to be responsible for such damage to persons or property as it is in fact responsible for. The industry will assume its responsibility for what it does. (R. 225)

The Commission's reference to sidetrack agreements is purely gratuitous. The Commission has no jurisdiction over sidetrack agreements insofar as liability for damage from fire is concerned. It dismissed a complaint brought by the shippers seeking a uniform sidetrack agreement, *National Industrial Traffic League* v. *A. & R., et al.*, 61 I. C. C. 120.

Map Exhibit A-37 (R. 356), shows the track layout of appellee's plant. The method of operation by the appellee was described by witnesses in the employ of the

appellee and of the railroad companies. The Commission, as an expert body, undoubtedly may draw whatever implications are warranted by an inspection of Exhibit A-37, but certainly cannot indulge implications which are contrary to the testimony of record. Trainmaster Cunningham of the Illinois Central-Yazoo & Mississippi Valley System, said (R. 226):

> "I don't think there is any service in the transportation scheme (of the Standard Oil Company's plant) that we couldn't perform."

CARRIERS GRANTED AN ALLOWANCE.

5. There is no evidence upon which the Commission could find (R. 110):

> "After about three years of refusal to comply with the industry's demand the Y. & M. V., *because of traffic pressure*, consented to pay an allowance of $1.20 per loaded car. For competitive reasons the L. R. & N. did likewise."

There is no evidence of record that either carrier consented to pay an allowance because of any threat of diversion of traffic to any carrier or of any "traffic pressure." This is a prejudicial statement inserted into the Commission's report without any basis of fact whatever. We have already referred to the testimony of record showing that the industry demanded the performance of the service by the carriers in accordance with their duty under the law, and that is the entire testimony on the entire matter.

AS TO ALLEGED "CONVENIENCE TO THE INDUSTRY."

6. There is no testimony of record upon which the Commission could find, (R. 110), page 71 of printed decision:

> "The manner in which the operations of this plant are conducted, and the hazards attendant upon them, in conjunction with the size of the industry and the complexity of the trackage layout, prevent the performance of any service by the connecting respondents beyond the present points of interchange unless conducted strictly *for the convenience of the industry and under its direction and control.*"

If the Commission's report means anything more than to point out that there is need for coordination between the two carriers and the industry, then there is no evidence of record whatever to support this finding. Mr. Flynn testified that the usual method of operation where two or more railroads serve a plant is to have an agreement worked out in advance as to how the operation shall be performed, so that each carrier may perform its service without conflicting with the other carrier. (R. 223)

The carriers would be permitted to spot the cars where required and the mechanics of operation would be the same regardless of the ownership of the power. Carrier power can enter the plant under the usual conditions under which they enter plants of other industries, and, as is the custom, a pre-determined agreement clearly setting forth the circumstances regarding entrance of carriers' engines, the service to perform, the manner in which the work will be carried out, and the liability feature, all to be covered in the customary or regular manner. (R. 224)

The testimony of the carriers fully supports and corroborates the testimony of Mr. Flynn in this respect. A

plant of the size of the Standard Oil operation at Baton Rouge requires a railroad switch engine practically all the time. (R. 226)

Cars arrive at Baton Rouge, in the trainyard, in various trains; and normally the Y. & M. V. assembles those cars and delivers them on the interchange track, if possible before 7 A. M. daily. The cars are received back on the interchange track by the railroad switch engine which serves other industries in that territory and is not assigned exclusively to the Standard Oil Company. There might be some adjustment necessary to be made so far as curves on certain plant tracks are concerned before the switch engine could operate there. (R. 226-7)

In the Baton Rouge Yard the Y. & M. V. has three types of locomotives, the 200-class switch engine, the 900- and the 3500. If the Y. & M. V. were called upon to switch the Standard Oil plant it would get the same type engines that the Standard Oil Company has. Trainmaster Cunningham testified that the 200-class switch engine, the smaller type, could switch the entire plant and such an engine is available. On some few occasions the Y. & M. V. has leased engine equipment to the Standard. (R. 229)

The testimony is clear that it is customary for the carrier and the industry to agree upon a method of switching the industry at the mutual convenience of the industry and the carrier. Common carrier operation at an industry is a service and it has never been the policy of the railroad, so far as this record discloses, to disregard the convenience of the industry. If common carriers are to serve industries, intelligent and helpful cooperation and coordination is required. The italicized portion of the above finding is in disregard of the testimony.

SERVICE NOT DESIRED SOLELY AT INDUSTRY'S CONVENIENCE.

7. There was no evidence upon which the Commission could find, (R. 110), page 72 of printed decision:

> "No legal obligation rests upon respondents to *perform switching or spotting service solely for the industry's convenience, and this in substance is admittedly what the industry here desires.*"

We take particular exception to the italicized portions of this quotation. There was no evidence upon which the Commission could find that the industry desired the carriers to perform switching or spotting service solely for the industry's convenience. We have already called attention to the testimony of Mr. Flynn, (R. 218), to the effect that he desires the service at the convenience of the carrier and the convenience of the industry. The switching service should be done by the Louisiana and Arkansas and the Y. & M. V. by arrangement among themselves, just as it is done at Shreveport, La., by the L. & A. for both carriers. (R. 220)

Over and over in the testimony of Mr. Flynn will be found the patiently repeated statement that it is entirely agreeable to the industry for the service to be performed under the same terms and conditions as apply at other plants where the railroad companies perform the service. (R. 221-4)

DELIVERY NOT ACCOMPLISHED ON INTERCHANGE TRACKS.

8. There was no evidence on which the Commission could find (R. 110) p. 72 of reported decision:

> "we find that the carriers have complied with their obligations under the interstate line-haul rates by the delivery and receipt of carload freight on the interchange tracks described of record."

The testimony of every witness who discussed the obligations of the carriers under their interstate line-haul rates is to the effect that it is the duty of the carrier to place the empty car at point of loading, remove the loaded car therefrom, place the loaded car at an appropriate point in the plant for unloading, and remove the empty car therefrom.

President Downs of the Y. & M. V. stated his view of the line-haul rates, (Exhibit A-40, R. 380), as follows:

> "The Y. & M. V. recognizes an obligation to handle loads and empties to and from the customary tracks within the plant."

Trainmaster Cunningham of the Y. & M. V. testified that the carrier is required to place the empties in the same manner as the Standard Oil Company is now placing them. (R. 230)

As further stated by Mr. Cunningham, the service given by the industry is about the service that the railroad would give any industry. As he put it (R. 230):

> "In other words, we wouldn't put a flat car at a sawmill where a box car was desired, no more than we would put a coal car at a loading rack where a kerosene car was necessary. We would put them in, of course, on the tracks designated."

Assistant General Manager David of the New Orleans, Texas & Mexico Railway, testified unqualifiedly that the service for which the allowance is made to the Standard Oil Company of Louisiana is one that the carrier is obligated to perform. (R. 234)

General Freight Agent Sheppard testified that the railroad company is required to perform the service of moving the empty car to the spot for loading and remove the loaded car therefrom. (R. 239)

Assistant General Freight Agent P. H. Coon of the New Orleans, Texas & Mexico testified that the rates apply from all points within the switching district. (R. 240)

The record shows that the interchange tracks at which the Commission says service under the carload rates terminates, are not on the property of the industry, but are tracks of the carrier on its right of way. There has been no delivery of freight consigned to an industry located within the switching district until the car has been removed from the right of way of the carrier and placed at a point where the consignor can unload it. It is impossible for appellee to unload cars from the so-called interchange tracks or to load cars thereon.

The answer of the Y. & M. V. to the appellee's bill of complaint (R. 145) expressly admits that:

> "it has duly published rates and charges for the transportation of property over its line in interstate commerce to and from the plaintiff's plant at North Baton Rouge, Louisiana, and that said rates and charges contemplate the receipt and delivery at said plant of the property so transported; admits that the plaintiff moves cars loaded with shipments of its property and empty cars used in connection therewith to and from interchange tracks at its plant whereon this defendant has placed said cars from and to points within the confines of said plant where said cars are loaded or unloaded; admits that the plaintiff demanded that this defendant perform the service of transferring empty and loaded cars received and delivered by it between said interchange tracks and said points of loading and unloading at plaintiff's said plant; admits that in lieu of performing said service this defendant elected to have the plaintiff perform said transfer service at its plant for which this defendant duly published and provided an allowance to the plaintiff of $1.20 per loaded car in its tariff duly filed with the Interstate Commerce Com-

mission, and thereafter has made and is making said allowance, as alleged in the bill of complaint."

SERVICE BEYOND INTERCHANGE TRACKS IS TRANSPORTATION.

9. There is no evidence upon which the Commission could find (R. 110):

"the service beyond the interchange tracks is a plant service;"

The only *plant service* performed by the appellee is the movement of cars from one point in the plant to another point in the plant. The volume of this business, during a representative period, was 5¾ cars daily, or one car in every four hours. All other car movements consist either of the movement of an empty car to a point of loading or from a point of unloading, or of a loaded car to a point of unloading or from a point of loading, over the tracks of the industry, to or from the tracks of the respondent railroad companies, which cars are by them handled between the tracks of the industry and points of origin or destination on the tracks of the respondent railroad companies or their connections.

If the statement above quoted is intended to be a statement of fact, it is wholly unfounded in any testimony in the record. If it is a conclusion by the Commission it is wholly unsupported either in fact or in law.

PAYMENTS ARE IN ACCORDANCE WITH SEC. 6 OF ACT.

10. There is no evidence upon which the Commission could find, (R. 110, p. 72 of printed report):

"by the payment of an allowance to the industry for service performed by it beyond the interchange tracks on interstate shipments, respondents provide the means by which the industry enjoys a preferential

service not accorded to shippers generally, and refund or remit a portion of the rates or charges collected or received as compensation for the transportation of property, in violation of section 6 (7) of the act."

The above quotation is unfounded in any testimony. No witness testified, and there is no evidence of any kind, upon which the Commission could find that in any respect the industry is preferred, (much less *unduly preferred*), or given any service not accorded to shippers generally under the interstate line-haul rates. There is no testimony of any witness or any evidence in this record that the respondent railroad companies refund or remit any portion of the rates or charges collected or received by the respondent railroad companies as compensation for the transportation of property.

Pan American Petroleum Corporation.

No. 314 in the Court below and No. 514 on appeal.

This industry is covered by the sixteenth supplemental report, 209 I. C. C. 394. (R. 52) The Commission's order was entered June 25, 1935. (R. 55)

The refinery is located at Destrehan, Louisiana, served by the Yazoo & Mississippi Valley Railroad Company, a subsidiary of the Illinois Central Railroad Company. The allowance condemned by the Commission's order, was 90 cents per loaded car and is provided in a published tariff (R. 454) which we have set forth in full, pp. 4, 5, *supra*.

ANSWER OF RESPONDENT RAILROADS.

Before discussing the facts in support of the allegations in the bill of complaint that there is no evidence upon which the Commission could make certain specific findings

of fact, we direct the Court's attention to the answer of the defendant, the Yazoo & Mississippi Valley Railroad Company (R. 133), in which it admits that its duly published rates and charges for the transportation of property to and from plaintiff's (appellee's) plant at Destrehan, Louisiana, contemplates receipt and delivery at said plant of the property so transported; that plaintiff demanded that the defendant perform the service of transporting empty and loaded cars between its interchange tracks and the points of loading and unloading at plaintiff's plant; and that in lieu of performing said service the defendant elected to have the plaintiff perform the said transfer service, for which it duly published and provided an allowance to the plaintiff.

THE RECORD RELATING TO DESTREHAN REFINERY.

The entire record of evidence received by the Commission in relation to the Destrehan refinery of this appellee was made at the session held by the Commission on May 11, 1935, and comprises testimony of the following witnesses only:

J. E. Monroe, Assistant Traffic Manager for appellee, whose testimony begins on R. 242;

F. W. Gray, Superintendent of appellee's refinery, whose testimony begins on R. 249;

W. W. Cunningham, Trainmaster, Vicksburg District, Illinois Central Railroad, whose testimony begins on R. 251; and

W. B. Higgins, Traveling Auditor, Illinois Central Railroad, whose testimony begins on R. 236.

The only exhibits received in evidence by the Commission relating particularly to the Destrehan refinery, were

exhibits Nos. A-35, being a map of the refinery, and A-36, a list of the various locations in this refinery. (R. 356)

The Commission's sixteenth supplemental report deals with the situation at appellee's plant. (R. 52) There are numerous features of the findings or statements of conclusions of fact, which are contrary to the evidence; and there is no substantial testimony in support of these findings.

CONTENTIONS OF APPELLANTS CONCERNING SUFFICIENCY OF EVIDENCE.

The brief for appellants treats with the Pan American Petroleum Corporation refinery at Destrehan on pages 54 to 61, reiterating the statements of the Commission's report and offering record references.

The mere citation of record references demonstrates, of course, that there was a substantial *amount* of testimony which dealt with the situation at the Destrehan refinery. However, the most outstanding characteristic of this record, which even a superficial examination should disclose, is its complete irrelevance and lack of probative force as bearing upon the question of the presence or absence of any interruption, interference, or plant disability affecting the spotting service by the railroad. The record itself thus demonstrates conclusively the arbitrary nature of the Commission's action in that it includes not even an earnest *inquiry* on the part of the Commission's examiner as to any physical facts from which an interference or interruption could be inferred.

It is, of course, impossible to discuss testimony or evidence which is not in the record. However, it is fair to assume that appellants, in their brief, would accord the most liberal interpretation of the record possible, in

arguing that the findings of the Commission are sustained by substantial evidence. Appellants discuss the Commission's report and findings and urge that the evidentiary facts which support those findings are, in substance:

(1) The industry prefers to perform the service itself and if the carrier were to perform the service some change in method of handling the traffic would be necessary.

(2) The switching of the plants by the carrier would necessitate the installation of spark arresters on the locomotive stacks to avoid an increased fire hazard.

(3) The switching of the plant by the carrier would necessitate the constant use of a locomotive for that service.

This, then, is the most that the record shows in support of the Commission's findings. We submit that it is a violent stretch of the evidentiary value of these facts to say that they demonstrate an interference by the industry in the spotting service as performed by the carriers.

As to the matter of *fire hazard,* it may be that the writer of the report and counsel for appellants regard this as an appropriate bit of "window dressing" to make it appear that, in a loose, popular sense, the service is not one which the carrier should be expected to perform.

Whatever may have been the intention, there is nothing in the evidence to indicate peculiar fire hazard at this refinery as contrasted with other refineries; and notwithstanding such element as there may be of hazard of fire in refineries, this circumstance has not affected the custom of the carriers in performing spotting services at refineries throughout the country.

The Court reasonably may assume that the handling of gasoline, naphtha, and other inflammables as produced in and shipped from these other refineries, and from the refineries at Norco, La., Tulsa, Okla., Wood River, Ill., Whit-

ing, Ind., Marcus Hook, Pa., etc., etc., involves some fire hazard. There is evidence that steam locomotives are used in these refineries, or most of them. The fact is wholly immaterial, however, since the evidence is clear that at all of these refineries the complete spotting service nevertheless is performed by the railroads; and as to most of the refineries by the railroad-owned and operated engines.

Furthermore, see *National Industrial Traffic League* v. *Aberdeen & Rockfish R. R. Co.*, 61 I. C. C. 120.

The evidence as to fire hazard supposedly existing at the Destrehan refinery is quite harmless. Here is what the record will be found to contain, responsive to questioning by the Commission's representatives (R. 244):

> "We put spark arrestors on the stacks of the Y. & M. V. locomotives because they use coal burners and we use oil burners."

The following appears on R. 245:

> "Q. Would there be any fear of fire hazard in letting the railroad engines come into the plant?
>
> A. Not as long as they had spark arrestors on; there would be a potential hazard as long as they didn't have spark arrestors on, but with locomotives in the plant with spark arrestors, I would say it would not be dangerous.
>
> Q. Would it be necessary for the Illinois Central to equip their locomotives any certain way in order to switch the plant?
>
> A. Just put spark arrestors on; it slips over the stack."

We quote the following from the examination of the plant superintendent, Mr. Gray (Or. Tr. 5171):

> "A. Rented from the Y. & M. V. You see, whenever we rented a locomotive from the Y. & M. V. we have to put on a spark arrestor.
>
> Q. Had to what?
>
> A. To put on a spark arrestor.
>
> Q. Your own engines are equipped with spark arrestors?

A. Our own engines are oil burners.
Q. That does away with—
A. All danger of fire.
Q. Now if the Illinois Central performs the service they would have to—
A. They would have to equip their locomotive with spark arrestors absolutely.
Director Bartel: Would there be any difficulty in dropping hot coals?
The Witness: We couldn't allow them to stop there and drop hot coals on our tracks.
Director Bartel: Well, as the engine progresses—
The Witness: I wouldn't say it would be as great a hazard as the sparks flying.
Director Bartel: Would you say it was a fire hazard to open the fire door and put in a fire?
The Witness: I wouldn't say so.
Director Bartel: Wouldn't the fumes ignite?
The Witness: No, sir. We have had coal burners in there with spark arrestors on them; we have never had any trouble.
Q. Are we to take your answers to mean that in your judgment the fire hazard is no greater from the locomotive where a coal burner is equipped with a spark arrestor than the operation of an oil burner?
A. Well, slightly more, but so slightly we would not kick about it."

Surely it cannot be contended seriously that the above described testimony concerning "fire hazard" tends to establish an interruption, interference, or plant disability, which would operate to restrict the carrier's obligation to deliver freight.

SUPPOSED NECESSITY FOR CONTINUOUS SERVICE.

There are a number of statements in the Commission's report, which tend to lead to the conclusion that the formal industrial requirements of the refinery are such as to require constant attendance of railroad locomotives

which would lay an undue burden on the railroad to fulfill. The evidence does not support any such conclusion.

We refer first to the statement that:

> "Under normal business conditions the plant locomotive is operated from 14 to 16 hours daily in spotting service, as the placement of cars for loading and their removal thereafter is practically continuous and a locomotive must be available at all times."

Second, there is the statement that:

> "The spotting service must be conducted in such manner as to provide an adequate supply of cars at such times as will meet the industrial needs, but respondent has never been requested to perform the service."

We refer to the further statement that:

> "If respondent were required to perform this service it would be necessary for it to assign a locomotive for exclusive use within the plant."

Also, the further statement is made in the report by way of conclusion that:

> "The record is persuasive that the Mexican Corporation finds it necessary for industrial reasons to perform the spotting service, and that such operation could not be successfully carried on by respondent's making two or even three daily switches within the plant."

The foregoing statements represent pure assumptions of the author of the report in construing the testimony of the witnesses. The evidence of record does not justify such conclusions or inferences.

We do not deny that it is possible to select particular answers, isolated from the rest of the testimony of the witnesses as *giving color* to one or two of the foregoing statements. For instance, suppose one or two of the an-

swers of the plant superintendent to questions by Director Bartel are selected out of the following, reproduced from Or. Tr. 5172-3:

"Director Bartel: If the Y. & M. V. was to do the spotting of your plant *and if it would necessitate keeping an engine at your beck and call at all times, wouldn't it?*

The Witness: I would say so.

Q. Director Bartel: In normal times?

The Witness: Yes, sir. Because in normal times we run our engine as high as 14 or 16 hours. We put two crews on. At the present moment we have only one crew. In ordinary times when our business is normal we put two crews on because one crew can't handle it. They start in spotting early in the morning and then they work there late at night.

Director Bartel: After those cars are spotted, say at this A, B, C, D, track, where you said six cars at a time, how long would it take you to load those cars?

A. The Witness: 20 or 25 minutes.

Director Bartel: Are they immediately pulled out and other cars spotted?

The Witness: Yes, sir.

Director Bartel: Is that a continuous operation?

The Witness: Yes, sir; practically. In the meantime they may have gone to spot some asphalt cars or other cars.

Director Bartel: Would the same thing be true in all your loading spots; that is, they are immediately loaded and other cars spotted?

The Witness: Yes, sir.

Director Bartel: So it would be necessary in order to have a continuous operation for your plant to have the engine there at your beck and call all the time?

The Witness: I wouldn't say all the time, but the greater part of it.

Director Bartel: Practically all the time the plant is in operation?

The Witness: Yes, sir."

The record before the Commission contains hundreds of illustrations of industries, including quite a number

of refineries, where the railroads perform the spotting service and where, in normal times, they have one, two or even a dozen locomotives regularly assigned to the work at the particular industry, as required by the *volume* of its business. So we say, it is of no significance that in normal times the engine at the Destrehan refinery, owned and operated by the refinery, works fourteen or sixteen hours per day or longer, or that two engines are continuously employed at times. Of course these engines do much other work not included in the carrier's obligation and not covered by the allowance. Their time when so employed was charged against the industry in the cost study by which the allowance is determined. Many of the answers of the witnesses are to be considered with that fact in mind, although it was not reflected in the questions.

Some of the thoughts reflected in the foregoing quotations from the report rest on inferences from the *questions* by the Commission's staff, rather than in *answers* by the witness. We quote part of the examination of Assistant Traffic Manager Monroe (R. 244):

"Q. Why do you have locomotives in your plant?

A. We always have.

Q. Why do you do that? Why not have the carriers do the spotting?

A. I couldn't answer that. To me it would seem just good business and economically sound for us to do it if we could do it cheaper than the Y. & M. V. Railroad.

Q. What difference does it make to you how cheap it was if they were going to do it for you?

A. That answers itself. It is a question of putting the buck on to someone else.

Q. Well, have you the locomotive on some convenience of the plant?

A. We had the locomotive from the very beginning.

Q. Why did you have the locomotive? Was it for your convenience or because you wanted to relieve the carriers of switching your plant?

A. I don't think we are philanthropic in that respect? I really couldn't say why we started switching the plant with our own locomotive.

Q. You are not doing it to relieve the carrier of any responsibility?

A. Oh, I wouldn't say that.

Q. You did it for a long time without any allowance, didn't you?

A. That is right; which I think was wrong.

Q. Why?

A. I believe if we do any service for the railroad they should pay for it, and if that service is included in the line haul rate I think we are entitled to an allowance on it."

In other words, the testimony of the witness, fairly quoted and read, reflected his understanding that the allowance was established to cover a service ordinarily included in the freight rate. He was questioned further on this point (R. 248):

"A. In other words, we took this position, that here we were performing a service that the carrier should perform and that service—the cost of that service included in the line haul rate.

Q. What led you to believe you were performing a service that the carrier should perform?

A. Because at all our other terminals, for instance the refinery at Savannah, our terminal at Jacksonville, our terminal at Tampa, our terminal at Memphis, Tennessee, our refinery at Baltimore, the service is all performed by the railroad.

Q. You assumed from that that the carrier was in duty bound to perform that service?

A. That is right, and then of course when this cost formula was given to us to go by, why, then we had to take and follow that cost formula literally and the moves had to be considered as a regular placement move that a railroad would make in ordinary switching service."

The subsequent testimony of carrier-witness, W. D. Higgins, who made the cost studies covering the allowances to the Destrehan refinery and the Baton Rouge refinery, definitely established, *first,* that such cost study was made under the C. F. A. formula, and *second,* that in charging various factors of cost, careful separation was made of all work done within the plant not in connection with the placement of cars as an obligation of the carriers, within the definitions of that formula and of the tariff. (R. 238)

As to the actual requirements of this industry in the way of transportation, its real need for an adequate supply of cars, its need for timely service, its reasonable necessities in the way of placement of empty cars and their removal after loading, and its further needs for so-called intraplant switching of cars, there is no weakness in the record, from appellee's point of view.

First, the record contains no evidence tending to show that the requirements and needs of this refinery are any different or more exacting in the way of service by the railroad than the requirements and needs of other refineries in general, which needs the carriers are fulfilling as a matter of course. For illustration, there is no evidence tending to suggest that the requirements of the Destrehan refinery exceed the requirements of the Norco refinery, where all the service is done by the Y. and M. V. engines and where, in normal times, two railroad switch engines were assigned and *constantly employed.* (R. 184)

Second, the record contains the affirmative evidence that the allowance to the Destrehan refinery was made after a cost study, based upon observation of the actual work performed during the representative period and under the regular formula adopted by the eastern car-

riers, and which appellants refer to in their brief with approval. (R. 238) This formula for cost ascertainment explicitly provides:

> 8. "The service between point of interchange and point of loading or unloading, as the case may be, shall be charged to the railroad provided it is a progressive movement to point of placement or delivery, performed without plant interruption or interference. If plant interruption or interference is encountered, the service after such interruption or interference shall be charged to the plant."

The foregoing paragraphs are quoted from Exhibit C 65, Volume No. 4 of bound Exhibits, page 430; and similar provisions are found in other editions of the carriers' rules, Exhibits 106 and 264.

The foregoing discussion hardly reveals any facts amounting to an interruption, interference, or plant disability, such as the Commission was presumably inquiring for; on the contrary, it seems hardly possible that an allowance made pursuant to the above formula could *possibly* be made for a service *beyond* such definitive point of interference, unless, of course, the formula was not properly applied. But the affirmative evidence that the formula was faithfully followed is uncontroverted anywhere in the record.

WHETHER THE RESPONDENT HAS EVER BEEN REQUESTED TO PERFORM THE SERVICE.

We have already quoted the sentence in the supplemental report which concludes with the statement:

> "but respondent has never been requested to perform the service."

The report contains the further statement:

> "There is some evidence that during the time when the allowance was being considered, respondent of-

fered to perform the service within the plant, but that such offer was refused."

In the first place, these statements are not clearly supported by oral testimony and there is no documentary evidence to support them. *In the second place*, the facts stated, if true or proven, would be entirely immaterial. *Stewart Iron Company* v. *Pennsylvania Company*, 47 I. C. C. 512; *National Malleable Castings Company* v. *Pittsburgh & Lake Erie R. R. Co.*, 51 I. C. C. 537, 540.

If, notwithstanding the foregoing precedents, it is considered important to determine whether the industry requested the carrier to perform the service, we invite attention to the testimony of record.

The following appears in the examination of Mr. Monroe, Assistant Traffic Manager (Or. Tr. 5146):

"Q. Did the Illinois Central ever refuse to perform that service for you?

A. Not that I know of. As a matter of fact, we have rented locomotives from them while ours was undergoing repairs.

Q. Did you ever ask the Illinois Central to perform the service for you?

A. No. We did give consideration to having them do it at one time but dropped it."

Refinery Superintendent Gray, who it will be self-evident would hardly be the man to decide the policy of the company in a matter of this nature, was asked, (Or. Tr. 5165):

"Q. In that period of time (five years) did you ever have under consideration the operation of these tracks by the Illinois Central in the spotting of cars?

A. No, sir.

Q. That question never came up?

A. No, sir; never came up with me. I never heard it discussed."

Other answers bearing indirectly on this phase of the testimony will be included in quotations under the next subject of our discussion:

AS TO WHETHER THE INDUSTRY PREFERS TO PERFORM THE SERVICE.

The report makes the direct statement, quoted in appellants' brief, that the Mexican Petroleum Corporation, for its own convenience, prefers to perform this service.

That is a statement not made on the authority of any responsible officer of the appellee corporation or by a responsible witness within the terms of his authority, or in any document or letter appearing of record. It is a conclusion unsupported by evidence and reflecting the surmise of its author.

Attention is invited to the following testimony by Mr. Monroe responsive to questions by the presiding Director of Traffic, appearing on Or. Tr. 5147:

> "Q. Did you object to the Illinois Central doing it?
>
> A. Well, I don't know what objection there would be to it.
>
> Q. Well, didn't the Illinois Central, as a matter of fact, say that they would do it at one time, that you preferred to do it?
>
> A. Well, I would imagine we would prefer to do it, just the general operations of the plant and so forth.
>
> Q. Why would you prefer to do it?
>
> A. We have all the facilities there, and we have been doing it all these years as long as I know of, back as far as 1919, I am positive; we may have been doing it from 1914-1915 on.
>
> Q. Didn't you object to the Illinois Central, advise the Illinois Central you objected to them doing the service within your plant?
>
> A. I did not myself.

Q. Did anyone representing your company do that?
A. I don't know offhand, Mr. Bartel.
Q. Well, if the Illinois Central were to undertake to do the service at the present time would you let them do it?
A. In preference to the allowance?
Q. Yes.
A. From a monetary standpoint I would say yes, because it costs us considerably more than what we receive."

The flat statement made in the report is not at all in harmony with the following further answers of Witness Monroe, appearing on Or. Tr. 5154:

"Q. Would you rather substitute that arrangement for the one you have at the present time, feeling, as you say, that the result would perhaps be equally efficient from the standpoint of the industrial operation?
A. Well, not knowing in any way which it could affect the operations of the plant, why—from this cost figure here, I would have to say yes, because we have never received anything from the railroad that is comparable with our actual costs.
Q. You say yes, you would rather have it substituted?
A. I would say yes, we would prefer to have the railroad do the switching."

It is not denied that the arrangement whereby the spotting service at the Destrehan refinery has been performed by refinery agents on the carrier's behalf, and partly at the carrier's cost, is *mutually* advantageous to both parties to the arrangement, the carrier and the shipper. That is because it makes for economy and efficiency for both parties, and is of disadvantage to neither.

Elsewhere in the report appears this statement:

"No legal obligation rests upon respondent to perform switching or spotting service solely for the industry's convenience."

We do not challenge that statement, but submit that it is wholly irrelevant to anything before the Commission or before this court, for no one contends that the Yazoo and Mississippi Valley Railroad is obligated to perform a service at the Destrehan refinery *solely for the industry's convenience.* There is nothing being done at that refinery solely for the convenience of the industry.

The error in the Commission's conclusion, we respectfully submit, rests upon the false notion that an arrangement which is mutually convenient both to the carrier and the industry is unlawful because of the mere fact it is of advantage to the industry.

The Celotex Company.

No. 315 in the Court below; No. 514 on appeal.

Appellee's plant is located at Marrero, Louisiana, adjacent to New Orleans, and is served by the Texas and New Orleans Railroad Company, the Texas and Pacific Railway Company, Missouri Pacific Railroad Company and the Texas Pacific-Missouri Pacific Terminal Railroad of New Orleans. The allowance, condemned by the Commission's order, was $1 per loaded car; and was dealt with in the 23rd supplemental report, 209 I.C.C. 764. (R. 70)

THE RECORD RELATING TO THE INDUSTRY AT MARRERO.

The entire record of evidence received by the Commission in relation to this industry was made at sessions held on May 9, 1932, at New Orleans and on May 19, 1932, at Galveston, Texas, and comprises the following witnesses:

W. T. Bowker, Plant Auditor for The Celotex Company, whose testimony begins (R. 187)

Roswell P. Pearce, Assistant to General Superintendent of the Marrero plant, whose testimony begins on (R. 189)

William N. Webb, General Traffic Manager for same, whose testimony begins (R. 200)

C. E. Dahlin, Traffic Manager at Marrero for The Celotex Company, whose testimony begins (R. 193)

Russell P. Watkins, Vice President and General Manager, Texas and New Orleans Railroad Company, whose testimony begins (R. 201)

Joseph Lallande, General Freight Agent, Texas and New Orleans Railroad, beginning (R. 203)

J. A. Lynch, General Freight Agent, Texas and Pacific Railway Company (R. 204)

E. S. Pennebaker, Manager, Texas Pacific-Missouri Pacific Terminal Railway (R. 205)

The only exhibits received in evidence relating particularly to this industry are Nos. A-24 and A-107, maps of Marrero plant (R. 353, 438); Nos. A-104 and A-105, contracts between The Celotex Company and Morgan's Louisiana and Texas Railroad and Steamship Company (R. 423, 430); No. A-105½, bill of sale of locomotive and analysis of car movements and cost of spotting (R. 431); and No. A-106, memorandum by Witness Lallande, as to tariff providing allowance (R. 433)

ANSWERS FILED BY DEFENDANTS.

Defendant, Texas and New Orleans Railroad Company filed its answer admitting the averments of various sections of the bill of complaint; further suggesting that the case really involves a controversy between the plaintiff (appellee) and the United States, in which the defendant is not a necessary party and that it should not

be required to admit or deny said allegations. It states, however:

> "If required to answer it alleges the facts to be that the allowances made by it and described in the reports of the Interstate Commerce Commission in Ex Parte 104, part II, were and are no more than the cost to plaintiff of performing the described service, and less than what it would have cost this defendant to perform the same; that when said allowances were published in the tariffs described in said bill, or in preceding tariffs, this defendant believed and yet believes that it was its duty as a common carrier to perform the services for which said allowances were made; and that there was no evidence or no substantial evidence to the contrary, or that the duty aforesaid was that of plaintiff before the Interstate Commerce Commission in said Ex Parte 104, part II."

CONTENTIONS OF APPELLANTS.

In asserting the sufficiency of the evidence to justify the Commission's order in the Celotex case, appellants devote nearly ten pages of their brief, pp. 61-70. They begin with a short reference to the maps and testimony pertaining to the appellee's plant at Marrero and then give a lengthy resumé of the Commission's report and the findings contained therein. The record references in this portion of the brief (pp. 63-66) are substantially all references, not to recorded testimony or exhibits, but *to the Commission's report*, as reproduced of record, and of course do not reveal any evidence.

The formal findings are erroneous.

The only formal findings in the twenty-third supplemental report will be found in the concluding paragraph on page 766 thereof (R. 72) and are in substantially the same language as the findings in all the other cases.

Having discussed in Part I the general questions of insufficiency of such findings, we shall here refer only to the evidence, or absence of evidence, bearing on the several findings as to this particular industry.

"INTERCHANGE TRACKS" ARE NOT POINTS FOR DELIVERY.

The purpose and use of the interchange tracks is simply to facilitate the inbound and outbound movement of cars in the manner in which, by mutual agreement and in accordance with general custom, the Texas and New Orleans Railroad Company and other carriers on the one hand, and The Celotex Company, on the other hand, have arranged for the handling of shipments in and out of this plant.

A map showing the various tracks within the industrial plant at Marrero, and the adjacent lines and tracks of the respondent carriers is in evidence as Exhibit No. A-107. (R. 438) A study of this map will reveal that the track layout is not particularly complicated and that it was undoubtedly well designed to facilitate the outbound and inbound movement of carload freight. There is no network of tracks, so situated and connected, as to indicate that they were designed for intraplant movements of materials incident to the manufacturing processes. As a matter of fact, the testimony of the several witnesses describing the work done, as well as the physical situation, shows that these tracks were designed for the terminal services necessarily incident to interstate transportation of carload freight and intrastate movements, as to materials having both origin and destination within Louisiana. (R. 191, 196)

The ownership of the interchange tracks is a circumstance disregarded in the report of the Commission. *The interchange tracks are owned by the carrier and*

situated on its owned right-of-way. (Exhibit No. A-104, R. 423) They are not within the plant inclosure. (Exhibit No. A-107, R. 438) Surely it cannot be said that delivery is accomplished when the cars are left by carrier-owned engines on carrier-owned "interchange tracks."

The terms of the formal contract between the parties are significant (R. 423):

> "In consideration of Celotex Company performing switching service which must otherwise be performed by Morgan Company, commonly referred to as "carrier service," this including the handling and placing for unloading of all loaded cars received for account of Celotex Company and handling outbound all loaded cars and empties, Morgan Company agrees to pay to Celotex Company the sum of One Dollar ($1.00) per loaded car received by and/or forwarded from Celotex Company's manufacturing plant via Morgan Company's line."

We submit that any practical railroad operating man and any reasonably minded layman would know that the so-called *interchange tracks* which parallel the Texas and New Orleans Railroad main line, as shown on Exhibit A-24 or A-107, could not possibly be utilized as points for loading freight or unloading freight and therefore as points for the delivery and receipt of shipments. It would be impossible to load cars at that point in consideration of the volume of the traffic; and this is obvious.

THE INDUSTRY PERFORMS A TRANSPORTATION SERVICE.

As to the *second finding,* (R. 72), there is no evidence whatever to sustain the conclusion stated:

> "that the transportation service for which the respondent carriers are compensated in their line-haul rates begins and ends at said interchange tracks;"

All the evidence before the Commission and before the court is directly to the contrary of the foregoing statement.

Nor is there any evidence whatever to support the *third finding*:

> "that the service performed by the Celotex Company beyond those points is a plant service."

All of the evidence is to the contrary. The work done by the Celotex locomotive, or tractor, in moving cars is in no sense a plant service, if that term is used in its ordinary meaning of the movement of materials from point to point within a plant as a part of the manufacturing processes, or to facilitate the private business of the industry. The service performed for which the allowance is now made under tariff is the movement of the cars as the initial stage of their interstate transportation from the point where the goods are loaded therein to the point from which the carrier begins moving them with its road engines, with corresponding conditions as to the inbound cars. This is a service of transportation.

The evidence of the various witnesses in this case is clear, and there is no conflict or contradiction in it. Mr. C. E. Dahlin, Traffic Manager at the Marrero plant, testified in substance, (R. 196):

> "The $1.00 allowance paid the Celotex Company covers the ordinary spotting of empties for loading and loads for unloading, and the return of the empties or the loads to the interchange tracks. That is between the interchange track and the various locations for loading and unloading throughout the plant. This allowance applies to shipments over the T. & P. destined to locations on the south side of the plant reached only by the Southern Pacific. This allowance also applies to shipments over the Southern Pacific destined to our bagasse plant, on

the north side, which requires a cross-over over the T. & P. In other words, the carriers make the Celotex Company an allowance regardless of where in the plant the cars are going. All the carrier does is spot the car on the interchange."

Vice President Russell P. Watkins of the Texas and New Orleans Railroad, an operating officer, testified as follows (R. 202):

"Q. If I understand your testimony, your $1.00 allowance was a substitute for what you had been doing with your own power?

A. It was to compensate them for performing service to their factory site. We had been performing it and would be relieved of that obligation."

It will be particularly noticed that this operating officer recognizes *the obligation* of the carrier to spot the cars. Of course, he is not a lawyer, dealing with legal definitions, but he certainly knows the custom of the carriers. He made this very emphatic in his further answers, (Or. Tr. 5963):

"Q. Your statement is that although you have agreed with The Celotex Company to make delivery at a specific point, that is to say, to place the cars in bound on an interchange track, and assume no liability for delivery after that, it is a matter of mutual agreement between you and the industry, you have done that only to be relieved yourself of what you believe to be your further duty to carry that traffic into a particular locality on the tracks of the industry?

A. Not what I believe my obligation to be, but what I know my obligation to be."

APPELLEE DOES NOT ENJOY A PREFERENTIAL SERVICE.

The *fourth* feature of the formal findings under discussion, (R. 72) is the stated conclusion:

> "that by payment of an allowance to the Celotex Company for service performed beyond the interchange tracks on interstate shipments, respondent carriers provide the means by which the industry enjoys a preferential service not accorded to shippers generally."

This finding is palpably erroneous; there is no evidence whatever to support it; and all of the evidence indicates that the service received by appellee is only that service which is accorded all industries served by defendant carriers, in conformity to their established practice.

There will be found in this entire record no reference to any other industry, engaged in the same or in a different line of business, which is being discriminated against by reason of the allowance paid and service enjoyed by The Celotex Company.

The finding is so phrased as to indicate that the Commission does not intend thereby to say that the allowance exceeds the cost of doing the work for which it purports to be compensation. There would be no basis for such conclusion on the record. The allowance is much less than the actual cost to appellee.

THE ALLOWANCE IS LESS THAN ACTUAL COST.

According to the uncontradicted testimony of the plant auditor, W. T. Bowker, for the entire period of about a year and a half, from November, 1930, through April, 1932, the total cost of operating the locomotive and tractor used in this service aggregated $20,437.18. The pay-

ments received from the railroads totaled $11,951.00. Some of the cars were of traffic not subject to allowance. The total movement was stated as 8,114 loaded cars inbound and 4,342 loaded cars outbound, a total of 12,456 loaded cars. (R. 188, 431)

Russell P. Watkins, Vice President and General Manager of the Texas and New Orleans Railroad testified that they had estimated that it would cost them $1.50 per car to perform the placement services at the Marrero plant *covered by their obligation under the freight rate;* and that it cost the industry more than $1.00, the amount of the allowance, to do the work. (R. 201)

THE ALLOWANCE PAYMENTS ARE NOT REBATES.

The fifth feature, or final conclusion in the Commission's findings, (R. 72) is that the respondent carriers by the payment of an allowance to The Celotex Company:

> "refund or remit a portion of the rates collected or received as compensation for the transportation of property, in violation of section 6 (7) of the act."

By its tariff published effective December 23, 1926, after informal submission to the Commission for its approval, the Southern Pacific provided (R. 455) that it would:

> "make an allowance of One Dollar per car to the Celotex Company for service performed in switching carload shipments of freight between loading and unloading tracks of the Celotex Company and track connections with the Morgan's Louisiana and Texas Railroad and Steamship Company, at Marrero, Louisiana. This allowance includes the movement and placement of a loaded car for unloading and the return of the empty car, or the movement and placement of an empty car for loading and return of same loaded."

That tariff defines explicitly the service for which such payment is made. That service comes clearly within the definition of the term *transportation* as found in section 1 of the Act. The provision for this allowance conforms with the requirements of paragraph (1) of section 6 of the Act. The same statements apply to the corresponding tariffs of the other carriers serving Marrero.

Erroneous statements of fact.

Aside from the formal findings, hereinabove analyzed and discussed, the Commission's report contains various statements of fact leading up to the findings and which are not supported by the record or justified by anything appearing in the testimony. We call attention to the following statements:

1. The erroneous statement that the plant locomotive and tractor are necessary facilities for carrying on the industrial use and their use prevents interference with plant operations which would result by the operation of carrier-owned locomotives, etc.

2. The erroneous statement that interchange service between the Texas and New Orleans Railroad and the Texas Pacific-Missouri Pacific Terminal Railroad of New Orleans, could be made only at a switching charge.

3. The erroneous statement that the track layout is such that neither of the carriers could perform the service for which the allowance is paid.

4. The erroneous statement that The Celotex Company's industrial requirements under normal business conditions can be met only in the manner in which operations are now conducted.

FACILITIES OF TRANSPORTATION.

In the petition for rehearing, filed with the Commission under date of July 30, 1935, (R. 77) the appellee complained of the particular error in the Commission's statement to the effect that the plant locomotive and tractor:

> "are necessary facilities for carrying on the Celotex Company's industrial work and their use prevents interference with plant operations which would result by the operation of the T. & N. O. or Terminal locomotives within the respective parts of the plant to which those carriers have access."

The evidence does not sustain this statement; it does not fairly reflect the situation; and yet if true, the facts indicated would not make the allowance unlawful.

If conditions at a particular industry are such that there would be some interference or necessity for one or the other to stand aside in case the railroad performed all transportation services with its locomotives and the industry did internal works switching with its engine, it is a fine thing when an arrangement can be made that will save inconvenience or burden to both parties—mutually advantageous to both. If the Commission's statement as quoted is correct, the most that can be said is that the arrangement at the Marrero plant is commendable because it means a cost to the carrier of only $1.00 per car for doing a service which its chief operating officer estimates would cost $1.50 per car for it to perform, within its admitted obligation under the rates. (R. 201)

EVIDENCE PROVES THE CARRIERS COULD PERFORM THE SERVICE.

In the aforesaid petition for rehearing, (R. 74) which the Commission summarily denied, appellee further assigned error against the statement in the report reading:

> "In this case the industrial layout is such that neither the T. & N. O. nor the Terminal, acting for the Missouri Pacific and/or the Texas & Pacific could perform the service for which the allowance is paid."

No witness expressed the opinion that it would not be possible for any and all of the carriers to perform the placement services in this industry; and there is no evidence of any condition which would prevent their doing so.

AS TO CELOTEX COMPANY'S INDUSTRIAL REQUIREMENTS.

The report states, (R. 72):

> "Whether any of the above carriers would be permitted to operate within the part of the plant accessible to them is not clear from the record, but it is definitely established that the Celotex Company's industrial requirements under normal business conditions can be met only by the use of its locomotive or a similar instrumentality in the manner in which the operations are now conducted."

There being no written or oral statement in the record, in any document or by any witness so far as we can discover, that would support either inference or suspicion that The Celotex Company officers would not permit the carriers to operate within this plant if they chose to do so, it seems peculiarly inappropriate for the Commission to inject the suggestive question by saying, "whether," etc., "*is not clear from the record.*"

A persuasive answer to the statement will be found in the formal return by the Texas and New Orleans

Railroad to the Commission's questionnaire. (R. 155, filed in this Court as an original, by stipulation) We quote question 8, *our italics*, and so much of the answer thereto as applies to The Celotex Company:

> *Question 8*:
>
> Where allowances are made, under circumstances defined in question 5 hereof, *did each industry leave it optional with respondent*—depending upon respondent's economy and convenience—either to itself perform the service with its own power, or have the industry perform it for the agreed allowance; and in reference to each industry *was it definitely determined* whether—in the light of the character and size of the industrial operation, the lay-out of the industrial plant tracks, interference by cross-overs, turn-outs, intra-plant switching, or other like conditions—*respondent, as a practical operating matter, could enter upon the private industrial tracks and perform the described services,* and that *the industry was willing* that such entry be made, and the service performed, by respondent's power *at respondent's convenience?*
>
> *As to the Celotex Company*:
>
> The answer is—Yes, as to service for which allowance is made.

COMMISSION INFORMALLY APPROVED THIS ALLOWANCE.

The record before the court (R. 155) contains copies of the correspondence in 1926 between the officers of the Southern Pacific Lines and The Celotex Company, on the one hand, and the Secretary of the Interstate Commerce Commission, on the other, wherein the Commission was fully advised of the proposed allowance to this industry before it was published by the carrier and accepted by the industry. The Commission gave its tacit approval thereto.

This correspondence is exceedingly enlightening. The

two corporations, the industry and the carrier, not only secured the approval of their respective lawyers of the legality of the proposed arrangement, (for which there was ample precedent in the Commission's prior decisions), but further sought the Commission's views and acquainted it fully with the proposed plan before filing a tariff schedule with the Commission establishing the allowance itself. The facts were fully set forth in the joint letter of the parties to the Secretary of the Commission bearing date September 25, 1926, and which is omitted from printing. (R. 155) We therefore quote as follows:

> "Near the town of Marrero, in Jefferson Parish, Louisiana, THE CELOTEX COMPANY has an extensive manufacturing plant where bagasse, or the fibre from sugar cane, is manufactured into insulating lumber known as 'CELOTEX.' This manufacturing plant is located adjacent to main line of Morgan's Louisiana and Texas Railroad and Steamship Company over which the railroad company operates freight trains. Switch tracks have been constructed from connection with said main line into premises of The Celotex Company, which said tracks are located within New Orleans yard limits and all switching service for said manufacturing plant has heretofore been performed by switch engines of the railroad company operating within said yard limits.
>
> To accommodate its rapidly increasing business, The Celotex Company has undertaken a substantial increase in capacity of its plant; additional units practically doubling its capacity are nearing completion and will be put in operation with this Fall's busy season, beginning on or about October 1st.
>
> With this increased capacity and the substantial increase in trackage provided by The Celotex Company within its premises, the switching service for said manufacturing plant must be increased and it is estimated that the average daily switch engine service of four hours heretofore performed by the

railroad company must be increased to eight hours and that during the busy season, from October 1st to Jan. 10, a switch engine will be required in continuous service.

It is understood that a substantial portion of the switching hereafter required by said manufacturing company will be for the sole convenience and benefit of said company and in no sense properly designated as 'carrier service.' It is admitted, however, that the carrier's obligation to place cars for loading and unloading will continue.

For convenience of both parties and in order to avoid delays and congestion in switching should both parties undertake operation of switch engines within the premises of said manufacturing company, certain contracts have been tentatively entered into by and between said parties, subject to the Commission's approval, providing:

First, for the construction of additional trackage necessary to handling the contemplated increased traffic at said plant, together with the use of certain trackage of the railroad company by said manufacturing plant in its operations.

Second, performance by the manufacturing company of all switching within its premises. Copy of contract providing for said switching service, dated Sept. 25, 1926, with accompanying copy of contract providing for use by said manufacturing company of railroad company's tracks, is attached hereto.

This said contract provides that the manufacturing company will perform that switching commonly and properly designated as 'carrier service' and as compensation therefor receive from the Railroad Company the sum of one dollar per loaded car received by and forwarded from The Celotex Company's manufacturing plant via the railroad company's line but, before making such contract effective, we wish to be advised by the Commission whether the same would be objectionable or in any way illegal.

We entertain no doubt of the legality of the proposed arrangement, or of its equity, and understand that in other cases, particularly represented by

United States Cast Iron Pipe & Foundry Company v. *Director General,* 59 I. C. C. 59, and *Pittsburg Forge & Iron Company* v. *Director General,* 59 I. C. C. 29, such contracts have been approved by the Commission, but we join in an informal way to secure an expression in this case, with advice as to whether provision for proposed allowance should be published in a tariff and filed with the Commission."

The Commission did not merely give this letter perfunctory acknowledgment. The Secretary wrote the carrier requesting further particular information for the consideration of the Commission, as follows:

"Dear Sir:

Referring to your letter of September 25, asking for approval of an allowance under section 15 of $1 per car to the Celotex Company for switching cars between its plant at Marrero, La., and the junction, please state for the information of the Commission the most distant and the nearest point within the plant where cars are to be placed and picked up, and the average distance to be covered by the interchange switching for which it is proposed to pay the industry an allowance of $1 per car.

Upon receipt of this additional information your letter will be referred to the Commission for consideration and you will be advised of the conclusion reached.

Respectfully,"

The information thus requested was furnished. The Secretary then made final reply to the joint letter of the parties. This reply contains not one word of criticism, or warning, or unfavorable comment. We quote the final reply in full, written under date of October 13, 1926:

"In further reply to your letter of September 25, having reference to a proposed allowance of $1 per car to the Celotex Company for interchange switching between its plant near Marrero, La., and the junction.

> Under section 15 of the Interstate Commerce Act, provision is made for payment to the owner of property transported for any service he may render, directly or indirectly, connected with the transportation, the charge and allowance therefor to be no more than is just and reasonable.
>
> While Section 6 of the act does not in express terms require the publication of allowances made to shippers under section 15, yet the Courts have held that allowances made to a shipper, even though reasonable in amount, are unlawful rebates unless published. Therefore the Commission has required tariff publication of all allowances made to shippers under sec. 15."

The foregoing statements are in accordance with the law. And in thus openly and candidly establishing an allowance, which the Commission now condemns as though it had been *a secret rebate*, the parties were following the precedent created as to sawmills by the Commission's requirements in the *Tap Line Case*, 23 I. C. C. 277.

Appellees are not contending that the Commission would be foreclosed from condemning any of these allowances by the fact that it had formerly approved them; we do contend that there is an absence of any evidence in this case either of changed conditions or that the facts were not fully and correctly stated when the carrier and the industry first submitted this matter to the Commission. At that time, the carrier admitted that these very spotting services at this plant were within the obligation which it assumed under its own freight rates. There is no evidence whatsoever to the contrary.

Great Southern Lumber Company and Bogalusa Paper Company, Incorporated.

No. 317 in the Court below; No. 514 on appeal.

These industries are covered by the 27th supplemental report, 209 I. C. C. 793. Both the sawmill of the Great Southern Lumber Company and the board plant of the Bogalusa Paper Company are located at Bogalusa, Louisiana, and are served only by the Gulf, Mobile and Northern Railroad Company.

While there are two industries covered by the Commission's report and order, and both are appellees, only the Great Southern Lumber Company has received payments from the carrier. In respect of these payments, this particular case has a distinctive feature not present in the others, which should be mentioned at the outset.

ORDER CONDEMNS AN ALLOWANCE WHICH WAS NOT PUBLISHED.

The Commission's order of July 12, 1935 (R. 93), required the Gulf, Mobile and Northern Railroad Company, to cease and desist, on or before September 3, 1935, from the practice described therein as unlawful, *i. e.*, the payment of *unpublished* allowances to Great Southern Lumber Company and Bogalusa Paper Company.

There was no tariff on file with the Commission, previous to the report and order, providing for an allowance to the Great Southern Lumber Company; and the payment to that company was not in dollars or cents per car for the shipments handled but was in the form of lump-sum reimbursements, monthly, for wages and costs of materials in connection with work done as the agent for the

carrier in respect to originating or delivering cars to and from six industrial plants at Bogalusa.[24]

SUBSEQUENT PUBLICATION OF TARIFF BY CARRIER.

Under date of July 26, 1935, Gulf, Mobile and Northern Railroad Company filed with the Commission its new schedule (R. 507) referred to in the bill of complaint herein (R. 85) and provided thereby the following allowances to the Great Southern Lumber Company and (or) Bogalusa Paper Company, Incorporated, *et al.*:

> "The above named industries are located within an industrial area within the switching limits of the Gulf, Mobile and Northern Railroad Company at Bogalusa, La. The Gulf, Mobile and Northern Railroad Company will perform the terminal switching service at its convenience on carload shipments originating at or destined to the plants of the industries. Such terminal switching service will consist of the handling of cars between the entrance to the industrial area and points convenient to the Gulf, Mobile and Northern Railroad Company adjacent to the plants.
>
> "When the Gulf, Mobile and Northern Railroad Company shall employ the industries to perform such terminal switching service for its account it will make an allowance to the industries therefor at the rate of 93 cents per loaded car, and for this allowance the industries shall also handle the empty car in the reverse direction."

The foregoing tariff represents full compliance by the respondent carrier with the terms of the Commission's order, insofar as it required desisting from the practice

[24] The formal order is directed against two of these industrial companies, the appellees herein. But the service which is forbidden is performed also on traffic to and from the sidetracks of New Orleans Corrugated Box Company and Union Bag & Paper Corporation, who are referred to in the report as well as in the evidence and of the Gaylord Bag and Paper Company and Bogalusa Turpentine Company, referred to in the evidence but not mentioned in the report.

of paying an allowance. Upon the effectiveness of such tariff, the case would have become moot, if the report were not interpreted as harmonious with the other supplemental reports and as forbidding the inclusion of the placement services at the carrier's expense under the freight rates.

THE RECORD RELATING TO BOGALUSA INDUSTRIES.

The entire record of evidence received by the Commission in relation to the sawmill and paper plant and adjacent industries in Bogalusa was made at the session held by the Commission in New Orleans on May 10, 1932, and the transcript thereof will be found in Volume No. 5 of the printed record. It comprises testimony by two witnesses only: J. P. Cassidy, Superintendent, Great Southern Lumber Company (R. 206), and G. P. Brock, Assistant General Manager of Gulf, Mobile and Northern Railroad Company. (R. 210)

The only exhibits relating to the Bogalusa situation were exhibits numbered A-27, being a map of the tracks at Bogalusa, A-28, a statement of the number of shipments handled in and out for representative periods and A-29, a statement of details of operating expense and payments made thereof to the Great Southern Lumber Company. (R. 353, 4)

ANSWER OF RESPONDENT RAILROAD.

Before discussing the facts in support of the allegations in the bill of complaint, that there is no evidence upon which the Commission could make certain specific findings of fact, we direct the Court's attention to the answer of the defendant, Gulf, Mobile and Northern Railroad Company (R. 140) and the following admissions contained therein:

"and admits *that it is the uniform custom and practice of common carrier railroad companies, including this defendant* and its connections, *to include within the carload freight* rates established and maintained for the transportation of cars and freight, *the complete transportation service* described in Paragraph 2 of said Section VII of said Bill of Complaint. And this defendant further admits that it is customary for railroads, including this defendant, sometimes to employ other railroad companies to perform for them their undertaking to spot or place cars, and to pay such other railroads for such service, and admits *that it is customary for railroads sometimes to employ a shipper* or receiver of the freight, or other agent or agency, *to complete such undertaking*, and to compensate such shipper, receiver and other agent or agency for such services, and this defendant admits that it follows, and that its predecessor, New Orleans Great Northern Railroad Company, followed, generally, such custom in serving shippers and receivers of freight on their lines of railroad; and this defendant further admits that, *pursuant to such custom*, it and its said predecessor *have always provided in their tariffs* that *for the compensation afforded by its established rates* for transportation between designated cities, towns or other station localities, *it would deliver and receive carload freight by the placing of the cars at any reasonable and convenient point for the loading or unloading thereof* on the tracks serving the plants of the plaintiffs herein, and each of them, at Bogalusa, La., the same as at all plants, industries, sawmills and business establishments adjacent to its railroad, and served by so-called private or industrial tracks, as well as on so-called public team tracks."

Furthermore, in paragraph V of the answer of this carrier (R. 142), referring to the testimony presented to the Commission is this admission:

"that so far as this defendant is concerned, it did not present any evidence whatsoever in said inquiry to the effect that in serving any industry, plant, sawmill, warehouse or other business establishment, including

> the complainants, it has ever sought to limit its duty or terminate its obligation under the line haul freight rates by placement of cars at any point intermediate to the place mutually agreed upon with its patrons as reasonable and convenient for the loading or unloading of carload freight."

The admissions of the carrier in the foregoing answers are directly contradictory of the Commission's findings; and all of the evidence supports the statements in the answer and does not give any substantial support to the Commission's findings.

CONTENTIONS IN BRIEF FOR APPELLANTS.

Pages 70 to 80 of the brief for appellants in this court are devoted to discussion of the findings and references to some of the testimony bearing on the industries at Bogalusa. We submit that nothing therein contained would support a finding of undue preference or other violation of any prohibitions in the Act.

THE FINDINGS IN THIS CASE.

The only formal findings in the supplemental report here under review are contained in the concluding paragraph on page 796, (R. 93) which reads as follows:

> "We further find that the transportation service which it is the duty of respondent carrier to perform under its interstate line-haul rates begins and ends at the interchange track described of record; that the service for which payment herein considered is made, is a plant service which respondent is not obligated to perform under the line-haul rates; and that by such payment the respondent carrier provides the means by which the industry enjoys a preferential service not accorded to shippers generally, and refunds or remits a portion of the rates or charges collected or received as compensation for the trans-

portation of property, in violation of section 6(7) of the act."

It will be seen that the foregoing paragraph contains four separate expressions of conclusion, three of which are not supported by any testimony whatever, are contrary to all of the testimony relating to these industries, and are against all of the evidence relating to sawmills generally throughout southern territory. The fourth is plainly not in accord with the statute, insofar as it applies to the *present* practice.

THE INTERCHANGE TRACKS ARE NOT DELIVERY POINTS.

It will be observed that *the first finding* is more in the nature of a conclusion of law than of fact, that the transportation service begins and ends at the interchange *track* described of record.

The interchange *tracks* are owned by the New Orleans Great Northern Railroad (now leased by Gulf, Mobile and Northern) and are shown in blue on the map of track layout at Bogalusa, Exhibit No. A-27. (R. 353)

This series of "interchange" tracks, under the arrangement made by the carrier with the Great Southern Lumber Company, is used as a convenient point for leaving the cars, both inbound and outbound, shipped to and from not only the sawmill of the lumber company but the other industries, Bogalusa Paper Company, Gaylord Bag and Paper Company, New Orleans Corrugated Box Company, Bogalusa Turpentine Company, and Union Bag & Paper Corporation. The cars are placed on these so-called interchange tracks, when moving inward, by the carrier engines, at random and without separation as between the six industries named. The classification and sorting out of the cars for placement of them in the sev-

eral industries is done by the lumber company engine as an instrumentality of the railroad, for which service the lumber company has been paid under the arrangement agreed on with the carrier. Correspondingly, on outbound shipments from the industries, the cars are assembled, by the lumber company engine and crews, on the interchange tracks, from which the carrier removes them as train loads. (R. 206, *et seq.*)

Under these circumstances, when the Commission holds that the transportation service ends at the interchange *track,* it disregards the plain facts. It could not possibly be held that by taking the cars to such interchange tracks the railroad had accomplished delivery in the case of cars intended for the Bogalusa Paper Company, or for Gaylord Bag and Paper Company or for the New Orleans Corrugated Box Company, or for the Union Bag & Paper-Corporation, or for the Bogalusa Turpentine Company when, by custom, practice, and under the aforesaid agreement, each of those industries has been enjoying the service of placement of the cars at their loading docks adjacent to their mills or warehouses, just the same as all other industries covered by this whole record. Inasmuch as delivery to these five concerns is not accomplished on the interchange track and the service does not end there, it is equally apparent that the service does not end at the interchange tracks in the case of shipments to and from the Great Southern Lumber Company sawmill.

All up and down the lines of the Gulf, Mobile and Northern, the Illinois Central, Missouri Pacific and other lumber carrying roads, cars moving into and out of large sawmills are in many cases left on and taken from interchange tracks by the carrier locomotives, and the service between the interchange tracks and the loading docks

and platforms, log ponds, is performed by sawmill-owned engines, working for the carriers, under allowances.

There is no testimony whatever tending to establish that the interchange tracks near the Bogalusa sawmill are, or would be, in fact, reasonably convenient points for the delivery and receipt of interstate shipments of carload freight moving to or from any of the six industries referred to.

It is clear from a mere glance at the map of the track layout that it would be physically impossible for the consignors to load the freight into the cars (which are but the vehicles or containers in which the freight is transported), while standing on the so-called interchange tracks. The purpose of those tracks is simply to facilitate the inbound and outbound movement of cars in the manner in which, by mutual agreement and in accordance with general custom, the Gulf, Mobile and Northern and the Great Southern Lumber Company have arranged for the handling of the shipments. This the record shows is for their mutual convenience and as a matter of economy for the carrier.

The layout of interchange tracks, and of loading and unloading and storage tracks at the Bogalusa sawmill and adjacent industries is fairly comparable with the track layouts at many other sawmills, where the carriers are paying allowances for the spotting services, by virtue either of the formal orders of the Commission in The *Tap Line Case,* or under informal approval of the Commission.

Maps of track layouts at numerous other such sawmills will be found of record. A glance at them will confirm our statements.

We invite attention to the map of the tracks serving

the Fisher Lumber Company at Ferriday, Louisiana, Exhibit A-21, reproduced as page 61 of Volume No. 3 of exhibits. Also the map of the same company's sawmill at Wisner, Exhibit A-22, page 62.

Also the map of the mill tracks of Davis Brothers Lumber Company at Ansley, Louisiana, Exhibit A-25, page 65 of Volume No. 3.

Also maps of the railroad facilities and mill tracks serving Caddo River Lumber Company at Glenwood and Rosboro, Arkansas, Exhibit A-26; map of Grant Timber & Manufacturing Company at Selma, Louisiana, Exhibit A-33; map of Frost Johnson Industries at Lorraine, Louisiana, Exhibit A-43; map of Hillyer-Deutsch-Edwards Lumber Company at Oakdale, Louisiana, Exhibit A-59; map of Industrial Lumber Company, at Elizabeth, Louisana, Exhibit A-60; map of Jasper County Lumber Company at Jasper, Texas, Exhibit A-61; maps of Kirby Lumber Company mills at Merryville, Louisiana, Exhibits A-66 and A-67; all reproduced in Volume No. 3 of exhibits.

These maps are all the more significant when it is borne in mind that most of these sawmill companies are receiving $3.00 and $4.05 per car as allowances for spotting service, with the Commission's approval, as contrasted with the 93-cent allowance now received by the Bogalusa sawmill.

THE INDUSTRY PERFORMS A TRANSPORTATION SERVICE.

As to the *second finding,* there is no evidence whatever to sustain the conclusion stated:

> "that the service for which payment herein considered is made, is a plant service which respondent is not obligated to perform under the line-haul rates;"

All of the evidence is to the contrary.

The service performed by the industry, as to shipments to and from the sawmill and Bogalusa Paper Company, as well as the other industries named above, is fully described of record by Witness Cassidy (R. 206-7) and by carrier witness Brock. (R. 210)

This is in no sense a plant service, if that term is used in its ordinary meaning of the movement of materials from point to point within a plant as a part of the manufacturing processes, or to facilitate the private business of the industry. The service performed for which the allowance is now made under tariff is the movement of the cars as the initial stage of their interstate transportation from the point where the goods are loaded therein to the point from which the carrier begins moving them with its road engines, with corresponding conditions as to the inbound cars. This is a service of transportation.

The situation at the Bogalusa sawmill comes clearly within the following description in The *Tap Line Case*, 23 I. C. C. 277, on page 293:

> "In all cases it is apparently the practice of the trunk lines, where no allowance is made, to set the empty car at the mill and to receive the loaded car at the same point. Indeed, they do this in many cases even when an allowance is made to the tap line. But whenever this service is performed by the trunk line, it is included in the lumber rate and is done without additional charge. In some instances the switch or spur track connecting the mill with the trunk line is as much as 3 miles long. In other words, by their common practice the public carriers interpret the lumber rate as applying from mills in this territory apparently as far as 3 miles from their own lines. So far as the manufactured lumber is concerned, it may therefore be said that where a mill has a physical connection with a trunk line and is not more than 3 miles distant the transportation offered by the trunk

line commences at the mill. If, therefore, a lumber company, having a mill within that distance of a trunk line, undertakes, by arrangement with the trunk line, to use its own power to set the empty car at the mill and to deliver it when loaded to the trunk line it is doing for itself what the trunk line, under its tariffs, offers to do under the rate. In such a case the lumber company may therefore fairly be said to furnish a facility of transportation for which it may reasonably be compensated under section 15 whether its tap line is incorporated or unincorporated. In other words, the lumber company thus does for itself what the trunk line does with its own power at other mills without additional charge and what it must therefore do for the particular lumber company without additional charge. Under such circumstances we think the lumber company, under section 15, may have reasonable compensation when it relieves the trunk line of the duty."

THE INDUSTRIES DO NOT ENJOY A PREFERENTIAL SERVICE.

The third feature of the formal findings, as quoted above, is the stated conclusion:

> "that by such payment the respondent carrier provides the means by which the industry enjoys a preferential service not accorded to shippers generally."

Such finding is defective to support a cease and desist order, in that it does not specify that the preference is undue or unjust; and it is not supported by any evidence whatever.

The record contains no reference to any sawmill which does not enjoy the same service, *i. e.*, the movement of the cars to and from points of loading and unloading on the tracks at the sawmill, wherever the sawmill may wish them placed by the carrier or at the carrier's expense through the medium of an allowance. Nor does the record contain reference to any paper company or bag company where such service is not enjoyed by the shipper.

PAYMENTS TO THE LUMBER COMPANY ARE NOT REBATES.

The report condemns this lumber company for allegedly receiving rebates amounting to less than one dollar per car, when numerous sawmill companies have enjoyed payments of three dollars per car, or more, under similar circumstances, by virtue of formal and informal decisions of this Commission!

The formal findings quoted conclude with the language:

> "that by such payment the respondent carrier * * * refunds or remits a portion of the rates or charges collected or received as compensation for the transportation of property, in violation of section 6(7) of the act."

In connection with this finding, we have the fact or circumstance, hereinbefore mentioned, which distinguishes this particular case from the other cases before the court, as reflected in the following paragraph in the Commission's report (R. 92):

> "Section 6(1) requires that every common carrier subject to the provisions of the act publish its established rates, fares, and charges for transportation, and likewise state all privileges or facilities granted or allowed and any rules or regulations which in anywise change, affect or determine any part or the aggregate of such rates, fares or charges, or the value of the service rendered to the passenger, shipper, or consignee. Clearly the value of the service here considered is affected by the reimbursement made to the industries by the N. O. G. N. The failure to provide by tariff for this payment is in violation of the act, and we so find."

No language similar to the foregoing paragraph will be found in any of the other supplemental reports dealing with other industries. In other words, as to the Bogalusa industries, the Commission says that the payments made

were unlawful because they were not provided for in a published tariff and therefore were in violation of section 6. (That *may* be correct.) On the other hand, notwithstanding that the allowances to all the other industries were specifically provided for in published tariffs, the Commission condemns them as no less unlawful, in violation of the same section.

Moreover, there is a fundamental difference between allowances which are expressed in cents per car and thus identified with the particular shipments, on the one hand, and lump sum monthly payments by way of reimbursement of wages and fuel, etc., having no definite relation to the particular shipments of the industry receiving such payments, on the other hand.

These questions, as we again suggest, have become *moot*, for the simple reason that the carrier has complied with the Commission's order. It has ceased making the payments condemned by the Commission's report, *i. e.*, reimbursing the Great Southern Lumber Company monthly for items of wages and supplies, in accordance with the arrangement which was not specifically provided for by tariff. It has published a tariff (R. 507), in compliance with so much of the order as condemns unpublished payments, by which it specifically provides an allowance of 93 cents per loaded car switched, thus definitely relating the payments to the shipments which move. And this is in strict conformity with the Commission's aforesaid expressions in The *Tap Line Case, supra.*

If it be contended that the question of legality of the payments in their former nature has not become *moot* and is yet to be resolved, we have these further suggestions:

First, these lump sum payments were based on monthly

bills for actual disbursements or expenditures by the lumber company in furnishing facilities and performing services of transportation, on the carrier's behalf, and clearly came within the *spirit* of the Commission's *Tap Line* decision. If distributed over the cars handled, they amounted to much less than the per car allowances contemplated by the scale of such allowances set forth in that decision.[25] They represented no profit to the lumber company. If in violation of section 6, it was entirely a matter of form, or technical violation, and the industry did not profit or benefit from the fact of the carrier's failure to publish a tariff.

Second, to the extent that these lump sum payments covered work done on cars shipped or received by the five other industries at Bogalusa, it seems very doubtful that there is any requirement in the Act of publication in tariff form.

Third, the fact of such payments was brought to the Commission's attention long before the hearing and the record of the hearing contains no intimation by the Commission's staff that it was felt there was anything irregular about these payments, by reason of the fact that they were not published or otherwise.

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[25] In its second supplemental report in The *Tap Line Case*, 31 I. C. C. 490, at p. 492, entered after the Supreme Court's decision which set aside the Commission's original order as invalid when applied to incorporated tap line railroads, the Commission fixed a scale to govern allowances out of the lumber rates and fixed the amount at $2.00 per car where the service performed was switching of a distance of less than one mile. That was in 1914 when all rates and the general standards of costs of everything in this country were on a much lower level. The allowance to the Great Southern Lumber Company is less than half the amount so fixed by the Commission.

The Frost Lumber Industries at Waskom, Texas, the Fisher and the Jones Lumber Companies at Ferriday, Louisiana, Kirby Lumber Company at Voth, Texas, are among those named in the evidence as receiving $3.00 per car. Delta Land & Timber Company at Conroe, Texas, Kirby Lumber Company at Call and Silsbee, Texas, and Merryville, Louisiana, Temple Lumber Company at Pineland, Texas are among those named of record as receiving an allowance of $4.05 per car.

Erroneous Statements of Facts.

The Commission's report contains a number of statements of fact which lead up to the findings therein and some of which are not supported by the record or justified by anything appearing in the testimony:

AS TO THE INDUSTRIES OTHER THAN THE LUMBER COMPANY.

The report refers to the Great Southern Lumber Company and the Bogalusa Paper Company as together occupying a large industrial area near Bogalusa. It then states:

> "Small portions of the industrial area are occupied by the New Orleans Corrugated Box Company and the Union Bag & Paper Company. The volume of traffic of the two latter industries is unimportant as compared with that of the two former. The two smaller industries are largely dependent upon the first-named companies for raw materials used in the manufacture of their products."

The foregoing statement does not reflect the evidence, which shows, among other things:

The New Orleans Corrugated Box Company, according to Exhibit No. A-28 (R. 353), had 1,454 cars in and out during the year 1931, from which it will be seen that it is a rather important industry in and of itself, having a volume of traffic exceeding 100 cars per month. The Bogalusa Turpentine Company, not mentioned in the Commission's report, had 144 carloads in and out during that year. The Union Bag & Paper Company and the New Orleans Corrugated Box Company are entirely independent in ownership of the Great Southern Lumber Company or the Bogalusa Paper Company. (R. 207)

The report further states, on a subsequent page:

> "The New Orleans Corrugated Box Company and the Union Bag & Paper Company are located on tracks owned by the paper company which are not accessible to the N. O. G. N. over its rails."

This statement may be misleading to one who is not familiar with the situation as it clearly appears on the map of the track layout, Exhibit No. A-27, *supra*. It is true that neither of these industrial concerns is served by tracks owned by the New Orleans Great Northern (now operated by the Gulf, Mobile and Northern), or by spur tracks which connect directly with tracks owned by the carrier. The carrier can gain access to these plants only by using rails owned by the Great Southern Lumber Company. But so far from this fact making it unlawful for the lumber company to receive an allowance, quite the contrary.

The Commission apparently overlooks the fact that under paragraph (3) of section 1 of the Act, tracks and terminal facilities may be and are transportation facilities and parts of the railroad systems, *regardless of ownership* of the tracks.

ALLEGED INTERFERENCE NOT SHOWN BY TESTIMONY.

The report contains this further paragraph (R. 92):

> "It is also definitely established that serious interference with plant operations would result if respondent should undertake the spotting service; that the N. O. G. N. would not be permitted to operate its locomotives within the plants at its convenience, even though it could physically do so; and that the convenience and industrial needs of the lumber and paper companies can be met only by the operation of the industrial locomotives."

There is no showing in the evidence that performance of spotting service by the carrier at these six Bogalusa industries, or any of them, would involve interruptions and interferences of the kind referred to in the original report of the Commission herein, 209 I. C. C. 11, at p. 44.

Accepting the Commission's foregoing definition of interruption or interference, the testimony does not show that either—

—the desires of the industries at Bogalusa,

—the disabilities of any of the plants,

—the manner in which the industrial operations are conducted,

—the arrangement or condition of the tracks,

—weighing service,

or any similar conditions would prevent the Gulf, Mobile and Northern from reaching the points of loading or unloading within these plants at its ordinary operating convenience, if it were to undertake to perform placement services with its own locomotives instead of hiring the work done by the Great Southern Lumber Company.

Any conclusions to the contrary must be based on pure assumptions rather than any evidence of probative value in the record.

Witness Cassidy, the Lumber Company's Superintendent, testified that the spotting arrangements made for economy and efficiency. (R. 207) He was then questioned, and answered (R. 208), as follows:

> "Q. Now, what are the considerations, if you happen to know, physical or otherwise, that makes the service you now render more efficient; is it a matter of delay that the New Orleans Great Northern might experience in its power if it tried to serve the four industries, or is it a matter of *interference with the*

industrial operations in and upon the industrial tracks of either of the four corporations?

A. I would say it would be more of a matter of interference as far as delay was concerned, because we have other engines of our own that operate in there too.

Q. Those other engines are engaged in making shifts from one part of your industrial operations to another part?

A. In that and delivery of logs to our mills.

Q. So that if the New Orleans Great Northern's engine entered upon those tracks it would encounter interference with your industrial engines engaged in making these shifts from one part of your plant to another part of your plant, and in the handling of the logs and so forth?

A. Yes, sir. We would have two engines belonging to two different companies, and under the supervision of two different companies operating over the same yard track.

Q. And was it to overcome this interference you entered into this arrangement to perform the service for the New Orleans Great Northern?

A. Partly so."

One would think that if by a simple arrangement of the character entered into at Bogalusa, any possibility of interference with plant operations could be avoided, at no cost to the carrier but rather at saving of expense for the carrier, this would be a mutuality of benefit and altogether desirable.

The carrier operating witness, Mr. Brock, also testified that the practice at these plants made for economy and efficiency to the railroad, and stated fully the reasons. (R. 210)

The foregoing evidence does not by any means justify the conclusion that the carrier would be prevented by interference and interruption from performing the spotting services at these industries.

One of the factors mentioned in the original report of the Commission, is "the arrangement or condition of its tracks," meaning the tracks of the industry. We are not unmindful that the report herein states:

> "Practically all of the industrial tracks are laid with 56-pound rail, which is too light to permit the operation of the locomotives used by the N. O. G. N. in switching at Bogalusa."

The foregoing statement may well give an unfortunate and none the less false impression. The evidence is that part of the tracks is laid with 56-pound rail; that the carrier is now using very large and heavy road-haul engines, for economy of train operation; and that such large road-haul engines could not well be operated over these industrial tracks. Many of the railroad owned yard tracks and branch lines are of 56-pound steel. The further evidence is that ordinary switching engines could be so operated; and that the carrier owns and would have available such switching engines suitable for operation on these tracks and which doubtless would be used but for the arrangement made with the lumber company. (R. 211)

SUPPOSED NECESSITY FOR CONTINUOUS SERVICE.

The Commission apparently assumes from the record that the necessities of these plants requires continuous all-day service by switching locomotive and therefore must be beyond the limit of any service reasonably covered by the established freight rates. The premise as to the actual requirements is not well founded, and if it were, the conclusion does not follow.

The record before the Commission contains hundreds of illustrations of industries where the railroads perform the spotting service and where, in normal times,

they have one, two or even a dozen locomotives regularly assigned to the work at the particular industry, as required by the volume of its business. So we say, it is of no significance that in normal times the lumber company has one engine at Bogalusa which is operated 12 hours per day. Of course its engines do much other work not included in the carrier's obligation and not covered by the allowance. Their time when so employed is not charged against the carrier.[26]

The following is the language of the report on this point (R. 92):

> "The spotting for which the N. O. G. N. assumes the cost, requires 12 hours daily, except Sundays. During the first four months of 1930, 1931 and 1932, a daily average of 46 loaded cars both inbound and outbound was handled at those plants. It is clear that the N. O. G. N. cannot reasonably be required to pay the costs of operating a locomotive 12 hours daily in handling this number of cars and that the service required is in excess of any service the respondent is obligated to perform under its line-haul rates."

It is quite true that the evidence shows the daily average of cars handled inbound and outbound was 46 *loaded* cars. It is a fair inference that for every loaded car an empty car was also handled. We would suppose that 92 cars per day, handled for account of six industries, would be a fair amount of work for a switching engine in twelve hours daily.

We do not find in the entire record any basis for supposing otherwise.

The details of the payments actually received by the

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[26]The formula adopted by the carriers to govern such costs studies provides in detail for charging against the industry, and excluding as elements entering into the cost of the spotting service, all items of work by the plant locomotive for the benefit of the plant and not in connection with spotting. (See Exhibit C-65 appearing in Volume No. 4 of bound exhibits, page 430.)

Great Southern Lumber Company for a representative month, January, 1932, are set forth in Exhibit No. A-29, appearing at R. 354. The lumber company's engine No. 8 handled in that month 1209 cars on thirty working days, or about 40 cars per day. The payment to the lumber company was an aggregate of $1,268.13, of which coal represented $513.35 and train crew labor, $640.92. This was about $1.00 per car reimbursement of expenditures, by the carrier to the lumber company.[27]

SPOTTING NOT DONE SOLELY AT INDUSTRY'S CONVENIENCE.

This statement is made in the report (R. 92):

> "The law is well settled that no legal obligation rests upon the carrier to perform switching and spotting service solely at the convenience of the industry."

We do not challenge that statement, but submit that it is wholly irrelevant to anything before the Commission or before this court.

These appellees have never contended, nor does anyone else contend, that the Gulf, Mobile and Northern Railroad Company is obligated to perform a service at the Bogalusa sawmill, or at the Bogalusa paper mill, or at the box factories, *solely for the industry's convenience.* There is nothing being done at any of those plants now, or at any time past, solely for the convenience of the industry.

[27] Compare this with the allowance of $2.00 per car to lumber companies for switching services at sawmills, fixed by the Commission in 1914 and with the $3.00 per car allowance paid, with the Commission's approval, to sawmills at Ansley, La., etc.

Humble Oil & Refining Company.

No. 690 in the Court below—No. 530 on appeal.

Appellee's refinery is located at Baytown, Texas, and is served by the Texas and New Orleans Railroad Company and the Beaumont, Sour Lake & Western Railway Company, a subsidiary of the Missouri Pacific Railroad Company. The allowance, condemned by the Commission's order is provided in published tariffs, of which the T. & N. O. tariff, (R. 692), is representative. It provides in substance that this carrier will pay the Humble Company 90 cents per car as compensation for service of:

> "switching carload freight, on which line haul transportation has been or will be performed, between loading or unloading tracks at the plant of the Humble Oil & Refining Company, on the one hand, and track connection with the Texas and New Orleans Railroad at Baytown, Texas, on the other hand.
>
> Such switching service, performed by the Humble Oil & Refining Company with compensation therefor paid by the Texas and New Orleans Railroad Company, will be in lieu of the performance of such service by the Texas and New Orleans Railroad, as provided for in tariffs lawfully on file with the Interstate Commerce Commission or Railroad Commission of Texas requiring the placing for unloading and the handling for forwarding of carload freight to and from locations on connecting industry tracks."

The Commission's 13th supplemental report (209 I. C. C. 727, R. 543) deals with the situation at appellee's refinery.

THE RECORD RELATING TO THE BAYTOWN REFINERY.

The principal evidence in regard to the several Texas refineries now before the court was taken at the sessions held by the Commission at Galveston, Texas, on May 16 to 19, 1932.

The case of the Humble Oil & Refining Company was called by the presiding Director of Service on May 19, 1932, at Galveston, (R. 321 and the case against this refinery was closed at R. 331; Or. Tr. 5911). Three witnesses testified, as follows:

W. S. Shirley, Yardmaster of Baytown refinery, beginning R. 321.

J. R. Davis, Traffic Manager for appellee, whose testimony begins at R. 325.

L. A. David, Assistant General Manager, Missouri Pacific Lines (recalled), whose testimony begins R. 329.

Counsel for the Texas and New Orleans Railroad, Mr. Tallichet, stated that respondent had no corrections to make in the testimony of Messrs. Davis and Shirley, and therefore did not present a witness. (R. 329)

The only exhibits of record concerning the Baytown refinery are the following:

Exhibit No. A-92, map of the track layout of the Baytown refinery. (R. 410)

Exhibit No. A-93, a cost statement or summary of expense and income for spotting service at the Baytown refinery. (R. 410)

Exhibit No. A-94, record of the loaded cars on which the switching allowance has been paid for the years 1930 and 1931 and first quarter of 1932. (R. 421)

Exhibit No. A-94½, a plat, not drawn to scale (Or. Tr. 5907) of the Baytown refinery. (R. 422)

ANSWERS OF RESPONDENT CARRIERS.

Before discussing the facts in support of the allegations in the bill of complaint that there is no evidence upon which the Commission could make the necessary findings of facts, we direct the Court's attention to the answer of the defendant, Texas and New Orleans Railroad Company, (R. 554) which represents that appellee's complaint presents solely a controversy between appellee and the United States and that this defendant therefore should not be required to admit or deny the averments of those sections. It further states, *our ital*:

> "If required to answer it alleges the fact to be that the allowances made by it and described in the reports of the Interstate Commerce Commission in Ex Parte 104, part II were and are *no more than the cost to plaintiff of performing the described service,* and less than what it would have cost this defendant to perform the same; that when said allowances were published in the tariffs described in said bill, or in preceding tariffs, this defendant believed and yet believes that *it was its duty as a common carrier to perform the services for which said allowances were made;* and that there was no evidence or no substantial evidence to the contrary, or that the duty aforesaid was that of plaintiff before the Interstate Commerce Commission in said Ex Parte 104, part II."

Defendants Missouri Pacific and Beaumont, Sour Lake & Western, and their trustees, filed their joint answer similar in terms to the answer of Texas and New Orleans Railroad Company. (R. 556)

The admissions in these answers were supported by the affirmative and uncontradicted testimony of witnesses for the carriers. There is no substantial evidence to create any question respecting the carrier obligation and duty as admitted in these answers.

CONTENTIONS OF APPELLANTS CONCERNING SUFFICIENCY OF FINDINGS AND EVIDENCE.

In the brief on behalf of the United States and the Interstate Commerce Commission, pages 88 to 97 relate particularly to the Baytown refinery of this appellee. Those pages contain references to the record as establishing certain facts, concerning most of which there is no dispute, such as the extent of the trackage, the number of loading and unloading locations, etc. But these facts and such evidence do not establish violations of law which would support a cease and desist order.

The appellants contend that the Missouri Pacific System could not operate in this plant, because it is an electric line, and that the Missouri Pacific established an allowance only to meet the competition of the Southern Pacific. We submit there is nothing unlawful in such situation and that an electric line may properly make a reasonable arrangement by which it can move traffic to and from an industry which is also served by a competitive steam railroad. Appellants emphasize such facts as that there are several placements of cars daily; that the work is now being done at the convenience of the industry and under control of its officials. None of these facts, however, tend to show anything unreasonable or unlawful in the modest allowance paid to this refinery.

The formal findings are erroneous.

The only formal findings in the supplemental report here under review are contained in the concluding paragraph on page 730 thereof, (R. 546), which reads as follows:

> "We find that the interchange tracks at this plant are reasonably convenient points for the delivery and

receipt of interstate shipments of carload freight; that the Humble Company performs no service beyond such points of interchange for which the T. & N. O. and Missouri Pacific are compensated in their interstate line-haul rates; and that by the payment of an allowance those respondent carriers provide the means by which the Humble Company enjoys a preferential service not accorded to shippers generally and refund or remit a portion of the rates or charges collected or received as compensation for the interstate transportation of property, in violation of section 6(7) of the Interstate Commerce Act."

The foregoing paragraph will be seen to contain four separate findings or expressions of conclusion. The first and second of these are not supported by any testimony whatever and are contrary to all of the testimony relating to this industry. The third and fourth are not only unsupported by evidence, but are in conflict with the statute.

"INTERCHANGE TRACKS" ARE NOT POINTS FOR DELIVERY.

As to *the first finding,* there is no testimony whatever tending to establish that the interchange tracks are, in fact, reasonably convenient points, or would be convenient points, for the delivery and receipt of interstate shipments of carload freight. Shipments have not been and physically could not be received for transportation, or delivered, by the carrier on said interchange tracks.

The interchange tracks are shown on the map of the Baytown refinery Exhibit No. A-92. (R. 410) This map shows the various so-called spotting locations throughout the refinery, explained in the legend at the bottom. The map and the locations for placement of

cars and the interchange tracks were all explained briefly by the first witness, Yardmaster W. S. Shirley. (R. 321, *et seq.*)

The ownership of these interchange tracks is a circumstance disregarded in the report of the Commission. *The interchange tracks are owned by the carriers* and situated on their owned rights-of-way. (R. 321) They are not within the plant inclosure. (Exhibit No. A-92.) Neither of the carriers comes within the plant in placing cars. Surely it cannot be said that *delivery* is accomplished when the cars are left by the railroad locomotives on these interchange tracks; or, custom and practice considered, that it is the plant's duty to take the cars to such interchange tracks at its own cost.

THE INDUSTRY PERFORMS A TRANSPORTATION SERVICE.

There is no evidence whatever to sustain the *second finding*:

> "that the Humble Company performs no service beyond such points of interchange for which the T. & N. O. and Missouri Pacific are compensated in their interstate line-haul rates;"

The service performed by the industry, (for which it is compensated as to part of the cost by the allowance received from the carriers), is fully described of record by the witnesses. That service will be seen to be the movement of the cars to and from the so-called *interchange* tracks, from and to points of loading and unloading in various parts of the refinery grounds. The cars are left by the carriers on or taken by each of the carriers from, the so-called interchange tracks, by virtue of the arrangement made between the carriers and the Humble Oil & Refining Company; under which

the industry acts as the carrier's agent in performing the spotting services; and therefore the cars are left near the gate of this plant by the carrier engines, unclassified, and to be sorted out by the industry engine before placement. (R. 322, *et seq.*)

The evidentiary facts do not support the Commission's conclusions.

The 13th supplemental report under review herein is decidedly deficient in statements as to facts appearing from the evidence which might lead to and support the stereotyped formal findings incorporated in the report.

It will be observed that there are many statements of facts appearing in the report purporting to indicate difficulties or impediments which would relieve the carrier of its obligation to deliver and receive shipments at the unloading and loading racks.

If it be conceded for purposes of argument that every statement of fact in the report (as distinguished from conclusions or findings) is correct and supported by testimony, there is nothing in the facts as so stated or as referred to by appellants in their brief which might justify the conclusions. No facts stated in the report tend to establish that the service performed by refinery engines is not a service of transportation; or that there is anything preferential or in anywise improper about the allowance which the report condemns or that any interruption or interference exists.

We submit the decision may be taken apart, paragraph by paragraph and sentence by sentence, and no facts will be discovered which tend to support the conclusions of the report.

ALLEGED COMPETITIVE REASONS BEHIND THE ALLOWANCE.

The report states (R. 545):

> "When the Missouri Pacific connected with the plant in 1927, in order to meet the competition of the T. & N. O., it granted an allowance in the same amount. It does not appear from the record whether the Missouri Pacific was ever given the option of performing the service instead of paying the allowance. However, that carrier is precluded from performing this service with its electric locomotives, as the use of cranes and loading devices within the refinery prevents the installation of trolley wires."

These statements do not tend to establish any violation of the Act and would not give support to a cease and desist order. Reading this report alone, these sentences are legally innocuous; but after reading others of the supplemental reports, anyone will readily conjecture that they were intended as a reflection on the action of the Missouri Pacific in granting appellee an allowance, for an actual service of transportation, which the carrier already serving that plant, had granted voluntarily, under precedent of Commission approval of like allowances to other industries. The inference that this may be a situation where *traffic influence,* in a sinister sense, led to an arrangement which is to be regarded unfavorably for that circumstance, is totally destroyed when one discovers that *originally* only one carrier served the plant and that when it granted the allowance it was putting this refinery on an equality with others.

It is, of course, true that *the subsidiary* of the Missouri Pacific was "precluded from performing this service with its electric locomotives." In the light of that fact, it seems absurd to suggest that the record fails to disclose whether the Missouri Pacific "was ever

given the option of performing the service instead of paying the allowance," particularly in view of the silence of the report on the affirmative point established by the record that *such option was given* by the appellee to the Texas and New Orleans. (R. 329)

Moreover, the report fails to mention the admission of the "Missouri Pacific" that the fact it was electrically operated was *purely its own disability.*

ALLEGED REQUIREMENT OF CONTINUOUS SERVICE.

In the long paragraph in the report which precedes the formal finding (R. 545) appears the following sentence:

> "The industrial operations require that some of the spotting locations be switched several times daily during times of normal business."

This is not true and there is no evidence to sustain the reason stated, although there is evidence of the fact that spotting is done at some locations several times daily. It is the transportation needs of this industry, *i. e.*, the very large volume of its outbound traffic, which results in the intensive use of its loading tracks. If a tank car can be filled in an hour or two, from a loading pipe, it is not common sense to demand that the producer shall provide and reserve a car length of track for twenty-four hours, and load only one car per day, when it would be just as simple for the carrier to use that track repeatedly for loading of several cars per day. Particularly is this so in the light of the testimony as to the character and measure of service afforded by carriers throughout the country at all refineries and other large industries.

We call attention to the testimony of operating wit-

ness L. A. David for the carriers (R. 330), which reflects the importance of this matter of volume of traffic:

> "Q. Would you say this would be the equivalent of team track switching?
>
> A. No, sir, *not for the number of cars.*
>
> Q. Do I understand from that that if you were called upon to switch this plant that you would not regard the service as in excess of simple team track service?
>
> A. It might be a little in excess. If we had 42 team tracks and an average of 4 loads for each one per day and we had 42 industry tracks with an average of 4 loads a day, *the performance would be practically the same.*"

The following further testimony of Mr. David (R. 330) is in point:

> "We set the cars out on the interchange track for the Humble Oil Company merely as a matter of convenience and we could place the cars direct at the point of unloading if it was so arranged."

The best answer to the error in the Commission's quoted statement, however, is to be found in the testimony of Traffic Manager J. R. Davis, who said (R. 327):

> "Possibly we could change the operation of our plant to conform to the carriers; we did it at seven other different plants, all of which are switched by the carriers. We have found in all points where we operate, and from several hundred sidetracks, that the carriers are just as anxious to offer us sufficient service to get the maximum tonnage as we are to get the maximum tonnage out and, as to service, we would be perfectly satisfied with the same good service we get at other places. We have crude oil loading racks loading 600 to 800 cars a day and requiring 6 to 8 switches a day. There is nothing that forces the carriers to give us that service except their desire for additional tonnage."

ALLEGED INTERFERENCE WITH PLANT OPERATIONS.

The statement is made in the report (R. 545), *our italic:*

> "The record is conclusive that beyond the present points of interchange no service could be performed by the locomotives of the Missouri Pacific and T. & N. O. at their convenience, as it would seriously *interfere with the intraplant switching* between the refinery and the docks."

The foregoing condition, of alleged interference by railroad engines with the plant service, if it were true, would be wholly immaterial to the question of the extent of the carriers' obligation, in the light of the principles stated by the Commission itself in the original report. And it is no mere inaccuracy of expression that the report puts it this way, for there is not a syllable of testimony that if the carriers undertook the spotting service with their own power, they would *encounter* interference which would terminate their obligation. We discuss the evidence bearing on this point on subsequent pages of this brief.

All the evidence establishes lawfulness of the allowances.

We do not contend that the court may properly set aside the Commission's order simply on the ground of failure to consider relevant and material evidence. We have recognized that the report would be valid if there is, or if there were, substantial evidence to support it and this regardless of what the court might consider was the preponderance of the evidence. Nevertheless, certain features of the uncontradicted testimony definitely foreclose the possibility of inferring from the mute evidence of maps and statistics that any interference or interruption does, or could, exist, or that the allowance paid was in any way unlawful.

There are three important features of the evidence bearing on the situation at the Baytown refinery which are completely ignored in the report, namely, (a) that the practice and arrangement has made for economy and efficiency; (b) that the record establishes an absence of *interference* as an element to be considered, and (c) that the allowance was authorized and approved by formal order of the Railroad Commission of Texas.

THE PRACTICE MAKES FOR ECONOMY AND EFFICIENCY.

The uncontradicted evidence is that economy and efficiency are served, both for the carrier and for the industries, by having the Humble Company do the work of spotting cars. The report ignores this evidence and the indisputable exhibits of cost studies.

Exhibit No. A-93, consisting of eighteen pages (R. 410), is a detailed statement of actual costs incurred for the last six months of 1931 by the Humble Company in all switching services for the carriers and for its own purposes, separated between the so-called interchange services in connection with through transportation and so-called plant service. It is not reduced to a basis of cost per car, but, as the witness offering it explained, it shows an actual cost substantially in excess of the amount of the allowance. (R. 328)

Witness J. R. Davis, Traffic Manager for appellee, testified that the costs of performing the conventional spotting services at this refinery were determined by the carriers in a cost study based on a complete test during the period from November 11 to 21, 1926, and the average was found to be 95 cents per car. There was then a large volume of movement. At no time since that test period has the cost been so low. (R. 328)

Witness L. A. David, for the Missouri Pacific Lines, testified in part as follows (R. 329):

> "The service as now performed by the industry is more economical than if the railroad were put to the expense of operating a steam locomotive. As an electric line, and the necessity of providing facilities and placing a special steam locomotive to do the work, the expense to the railroad would be more than double what it would be under other circumstances, and the present arrangement is more economical than the railroad could do it as a steam operated railroad."

There is no testimony by any witness to indicate that the arrangement is not economical to the carriers and efficient for all concerned.

RECORD ESTABLISHES ABSENCE OF INTERFERENCE.

The report disregards entirely the uncontradicted affirmative proof that the performance of spotting service by the carriers would not entail interference from plant operations, of the character contemplated by the Commission's original decision, and sufficient to relieve the carriers of the obligation to deliver and receive at loading and unloading points.

The allowance was first established by the Texas and New Orleans Railroad. It is therefore of interest to note the following categorical answer by that company in its return to the Commission's questionnaire, sent up as an original in the record before this court:

> "Question 9:
> Are allowances of the nature described in question 5 hereof now being made *to any industries* which, because of interference by respondent's power with the industrial plant operations, or operation of plant power on the private industrial tracks in intra-plant services, have definitely refused or expressed

unwillingness to permit the entry of respondent's power upon the private industrial tracks for the purpose of performing the described services? If so, specify them by name, location, and character of business?

Answer: No."

The testimony of the several witnesses, without conflict or contradiction and therefore deserving acceptance, fairly requires a finding by the Commission that there would be no interference if the carriers performed the spotting service. We rely on the entire testimony of Witness W. S. Shirley, Yardmaster, and Traffic Manager J. R. Davis. (R. 321-328)

We have already discussed the sentence in the report of the Commission reading in substance that the railroad locomotives could not operate beyond the interchange tracks:

"as it would seriously interfere with the intraplant switching between the refinery and the docks."

The report does not state the converse of this proposition, that the intraplant work of the refinery locomotives would necessarily interfere with the performance by the carriers of the spotting service. The testimony would not support such statement, although the Commission's staff tried to develop that thought through questions of the witnesses.

Yardmaster Shirley admitted that if the railroads performed the spotting services, there would be some interference with the intraplant work, which is the foundation for the Commission's statement as quoted:

"Q. But if the Missouri Pacific and the Southern Pacific did not perform that service and restricted themselves only to the placing of inbound or outbound cars for either loading or unloading, and the plant continued to perform its own intraplant service with

its own power and continued also to make its movement from spots within its plant down to the dock, I understood your answers to be that unless that was done under some arranged schedule, there would be some interference *with your processes?*

A. Yes, sir." (Or. Tr. 5896-7).

There is not any testimony, however, to indicate that the plant would not accommodate its operations so as to avoid interference with the carriers *if they performed the spotting service.* We quote Mr. Shirley further, Or. Tr. 5897:

"Q. Now, just what is this interference that you have spoken of so much, Mr. Shirley? We do not quite understand what you mean by interference?

A. If we were working an engine ourselves, taking care of our own plant service, we would have to have an agreement when they were busting up a train for them to let us by.

Q. You could wait, couldn't you?

A. Yes, sir.

Q. It could be arranged?

A. Yes, sir."

Traffic Manager Davis was questioned by Director Bartel and stated, R. 326-7:

"there is no reason why any railroad using normal power, any steam railroad, can not come in to the plant and operate it, and, so long as it does not increase our switching cost, we have no objection to the carrier performing the service. Our natural desire is to operate the plant as economically as possible, whether we operate it or they are doing the service.

"Dir. Bartel: You say if it increased your cost, you would not want them in there. How do you know that there would not be any interference if your power was operating around the plant?

A. There is more than one switch engine operating in this city, Mr. Director; there would have to be some arrangement made that one locomotive was

clear of the track before another one got on it; *it would be a matter of coordination between the two. Possibly we could change the operation of our plant to conform to the carriers;* we did it at seven other different plants, all of which are switched by the carriers. We have found in all points where we operate, and from several hundred side tracks, that the carriers are just as anxious to offer us sufficient service to get the maximum tonnage as we are to get the maximum tonnage out and, as to service, we would be perfectly satisfied with the same good service we get at other places."

The foregoing expression by Mr. Davis for the Humble Company is truly enlightening. All this industry would want or expect is the same sort of service that the carriers give all refineries.

The Commission has laid down the general rule which it thinks should be followed by its original report, 209 I. C. C. 11. The appellee was entitled to a statement in this supplemental report of the conclusion, which the evidence requires, that there would be involved at the Chaison refinery no interruptions or interferences of the kind referred to in the statement of the Commission on p. 44 of the original report. For, accepting the Commission's definition of interruption, the testimony does not show that either—

—the desires of the Humble Company,
—the disabilities of the plant,
—the manner in which the industrial operations are conducted,
—the arrangement or condition of the tracks,
—weighing service,

or any similar circumstances, would prevent the Texas and New Orleans from reaching the points of loading or unloading within this plant at its ordinary operating convenience, if it were to undertake to perform placement

services with its own locomotives instead of hiring the work done by the refining company.

Any conclusions to the contrary must be based on pure assumptions rather than any evidence of probative value in the record.

COMMISSION APPROVAL OF ALLOWANCE.

The Commission's report here under review, mentions the 10th supplemental report, *Magnolia Petroleum Co. Terminal Allowance,* 209 I. C. C. 93, which treats with the allowance previously granted to that Company, at its Chaison refinery, in the same amount, 90 cents per loaded car, as granted the Humble Company.

The report in the Magnolia case makes bare mention of the fact that the allowance to that appellee, as well as to certain other refineries, was submitted to and formally approved by the Railroad Commission of Texas. (R. 399). It ignores the submission of this matter by the carrier and the Magnolia Company jointly to the Interstate Commerce Commission out of a desire to know "whether or not such an agreement would be objectionable or in any sense illegal." (R. 398)

The Commission's 13th supplemental report, dealing with the Humble Company's allowance at Baytown, refers in a very sketchy way to the negotiations and does not mention the fact that this allowance was established by the Texas and New Orleans subsequent in point of time to the Commission's informal approval of the Magnolia allowance. Yet this is manifestly a fact which the parties had in mind when they entered into the arrangement at the Baytown refinery.

Witness Davis for the Humble Company stated that they first took up the question of an allowance some time

in 1926, in which year the Southern Pacific acquired the Dayton-Goose Creek Railroad which theretofore had served this plant:

> "Just about this time or shortly prior thereto the switching allowance had become in general vogue and was made to all plants and we awoke to the fact that we were performing a service for the carriers which they could easily perform for us, or for which we should be compensated." (R. 326)

It is of considerable significance that the Railroad Commission of Texas had announced its order, dated April 23, 1926, after public hearing and the taking of much testimony wherein it had formally recorded its approval of the principle of spotting allowances to Texas refineries. Its order is of record as Exhibit No. A-74, (R. 399)

Magnolia Petroleum Company.

No. 691 in the Court below—No. 530 on appeal.

Appellee's refinery is located at Chaison, Texas, and is served by the Kansas City Southern Railway Company and the Texas and New Orleans Railroad Company. The allowance to this industry by those carriers, of 90 cents per car, was condemned by the Commission's order following the 10th supplemental report, 209 I. C. C. 93. (R. 574)

TARIFFS PROVIDING FOR THE ALLOWANCE.

Both of the allowance tariffs are in evidence; and the tariff filed and maintained by the Texas and New Orleans Railroad Company is representative, (R. 695). It provides:

> "The Texas and New Orleans Railroad Company will pay to the Magnolia Petroleum Company an allowance of ninety (90) cents per car, as compensa-

tion for service, performed by the Magnolia Petroleum Company, of switching carload freight, on which line haul transportation has been or will be performed, between loading or unloading tracks at the plant of the Magnolia Petroleum Company, on the one hand, and track connection with the Texas and New Orleans Railroad at Chaison, Texas, on the other hand.

Such switching service, performed by the Magnolia Petroleum Company with compensation therefor paid by the Texas and New Orleans Railroad Company, will be in lieu of the performance of such service by the Texas and New Orleans Railroad, as provided for in tariffs lawfully on file with the Interstate Commerce Commission or Railroad Commission of Texas requiring the placing for unloading and the handling for forwarding of carload freight to and from locations on connecting industry tracks. (R. C. T. Circular No. 69911.)"

THE RECORD RELATING TO THE CHAISON REFINERY.

The principal evidence in regard to the several Texas refineries now before the court was taken at the sessions held by the Commission at Galveston, Texas, on May 16 to 19, 1932. The matter of the Magnolia Petroleum Company, *Chaison refinery,* was called on May 18th, and the following witnesses testified:

J. D. Hurst, traffic representative, (R. 279).

W. M. Maddox, Traffic Manager for appellee, R. 283.

T. H. Meeks (recalled), Assistant to General Manager, Texas and New Orleans Railroad, beginning on R. 297.

Relating to conditions at other Texas refineries and therefore relating indirectly to the general situation affecting the Chaison refinery is the testimony of various witnesses taken at the same session beginning at R. 252 and extending through to R. 330.

The evidence of officials of the Kansas City Southern Railway System regarding the Texas refineries was received at a later session of the Commission held in Kansas City on May 23 and 24, 1932. The following carrier witnesses testified, more particularly as regards the situation in the Port Arthur district and directly relating to the situation at Chaison:

W. N. Deramus, General Manager, Kansas City Southern Railway, R. 331.

H. A. Weaver, Vice-President in charge of Traffic, same carrier, R. 343.

J. O. Hamilton, General Freight Agent, Texarkana & Fort Smith Railway, R. 347.

C. E. Johnston, President, Kansas City Southern Railway, R. 349.

The only exhibits received in evidence by the Commission, relating particularly to Magnolia Petroleum Company, Chaison refinery, are: No. A-72, map of refinery and the tracks serving it (R. 397); No. A-73, copies of correspondence between the Commission and the appellee regarding switching service and spotting allowance (R. 397-8); No. A-74, order of the Railroad Commission of Texas authorizing this allowance. (R. 399)

No. A-75, cost statement covering spotting service at Chaison refinery June 1, 1923, to December 31, 1924 (R. 403); No. A-76, similar statement covering the period 1925 to 1929, inclusive, (R. 404); No. A-77, similar statement covering the year 1930, (R. 405); No. A-121, further cost statement at Chaison refinery and blueprint of tracks, (R. 449); and Nos. A-122 and A-123, correspondence relating to switching at Chaison refinery, (R. 451-3).

ANSWERS OF RESPONDENT CARRIERS.

Both of the carriers serving appellee's refinery were named as defendants in the bill of complaint and filed their answers thereto. These are in substantially the same language as the answers filed in the other cases, particularly in No. 690, from which we have quoted on page 153, *supra.*

CONTENTIONS IN BRIEF FOR APPELLANTS.

The individual suit of Magnolia Petroleum Company is discussed on pages 97 to 102 of the brief for appellants. The matter is there presented *de novo,* as though it had never been passed on by the District Court; and the contention that the Commission's order should be sustained is based upon a review of the report with various assertions as to the physical facts and the most meager of references to the record. Emphasis is placed on the fact that "this was the first allowance granted to an oil company in that section of the country". (p. 99) This, however, does not make the allowance unlawful; any more than the first allowance to a sawmill in southern territory may have been unlawful, the first allowance having been ordered by the Commission itself!

The brief for appellants contains no citations of particular evidence of violations of the law or references which would indicate that the court below erred in setting aside the Commission's order.

The formal findings are erroneous.

The only formal findings in this supplemental report are contained in the concluding paragraph, (R. 579), which reads as follows:

> "We find that the interchange tracks at this plant are reasonably convenient points for the delivery and receipt of interstate shipments of carload freight; that the industry performs no service beyond such points of interchange for which the respondent carriers are compensated in their interstate line-haul rates; and that by the payment of an allowance the respondent carriers provide the means by which the industry enjoys a preferential service not accorded to shippers generally and refund or remit a portion of the rates or charges collected or received as compensation for the interstate transportation of property, in violation of section 6(7) of the Interstate Commerce Act."

The foregoing paragraph will be seen to contain four separate findings or expressions of conclusion. The first and second of these are not supported by any testimony whatever and are contrary to all of the testimony relating to this industry. The third and fourth are not only unsupported by evidence, but are in conflict with the statute.

"INTERCHANGE TRACKS" ARE NOT POINTS FOR DELIVERY.

As to *the first finding*, there is no testimony whatever tending to establish that the interchange tracks are, in fact, reasonably convenient points, or would be convenient points, for the delivery and receipt of interstate shipments of carload freight. Shipments have not been received for transportation, or delivered, by the carrier on said interchange tracks, and could not be, for

obvious physical reasons. Nor would the tariffs permit this.

The interchange tracks are shown on the large map of the Chaison refinery, received in evidence as Exhibit No. A-72, (R. 397). The map was explained by the first witness who testified concerning this refinery, J. D. Hurst, (R. 280, *et seq.*); and the witness stated the use made of the interchange tracks:

> "As I have stated before, both roads enter our plant at the same gate, and when they come into our yards the cars will be spotted on one of the tracks shown as 1, 2, 3, 4, or 5, and the outbound train consisting of loaded cars and empty cars that have been unloaded will be picked up by the carrier on one of those same tracks. We have no special track for the K. C. S. or T. & N. O.
>
> "It takes a crew about 15 minutes to come in and set out a train and pick up an outbound train. Our yardmaster will tell the road crew on which track to set the inbound cars and on which track to pick up the outbound cars. * * *
>
> "Tracks 1, 2, 3, 4, and 5 are connected at both ends, so that the train may be broke up and the cars shoved from either end of the track. The same thing applies to the loading tracks 6, 7, 8, and 9, so that we have each end available for the make-up and break-up of the train and the spotting of cars.
>
> "If the switching service should be performed by the carriers only one of those yard tracks would be necessary. In other words, we would have four useless tracks."

The witness testified in detail concerning the location of the various loading and unloading places for the various commodities and the manner in which the inbound and outbound carload traffic is transported.

There is no evidence to be found in the record conflicting with Witness Hurst's foregoing testimony. In

fact, it was confirmed by the railway witnesses, without qualification. (R. 297)

Assistant General Manager Meeks of the Texas and New Orleans Railroad testified as follows (O. Tr. 5727):

> "Q. Are you familiar with all the general places for spotting in that plant?
>
> A. In a general way. I have not been over the plant in the last few months.
>
> Q. Assuming they are as they were when you were last over that plant, the testimony of the witness was that these various spots are spots at which you have spotted cars—are they a part of the carrier's obligation, as you understand it?
>
> A. Yes, sir.
>
> Q. It is a part of the carrier's obligation in this country?
>
> A. Yes, sir.
>
> Q. What is the practice of spotting cars in this country, putting them where they want them, or just some place where it is convenient?
>
> A. We put them where they want them."

W. N. Deramus, General Manager of the Kansas City Southern and Vice President of Texarkana & Fort Smith Railway Company, testified at the Kansas City session on May 23, 1932, and covered conditions at the Chaison refinery. (R. 332, *et seq.*) His testimony (R. 337, *et seq.*) is most convincing of the inevitable conclusion that the so-called interchange tracks at the Chaison refinery could not possibly be regarded as reasonable points for delivery and receipt of shipments.

This *first finding,* that the interchange tracks are reasonably convenient points for the delivery and receipt of interstate shipments, reflects certain statements of conclusion appearing in the paragraph of the report (R. 579) immediately preceding the findings and which reads as follows:

"The record is conclusive that the interchange tracks at the Magnolia Company plant were constructed by that company primarily for its convenience in the receipt and delivery of carload shipments. Its locomotives are instrumentalities necessary for carrying on the industrial processes. The present method of spotting cars is employed strictly for the convenience of the industry and the service could not be performed by the carriers except by the use of locomotives assigned to work under the direction and control of the industry. Carriers have no obligation under their line-haul rates to perform service beyond an agreed point of interchange solely for the convenience of an industry. *Merchant Shipbuilding Corp.* v. *P. R. Co.*, 61 I. C. C. 214, 217; *Car Spotting Charges*, 34 I. C. C. 609, 617. The record shows that cars interchanged with the industry have been received and delivered by respondents upon tracks designed specifically by the oil company for that purpose, or by long usage established as the proper and agreed interchange point."

There is no evidence to warrant or support these statements of conclusions, some of which are only half-truths, while others are pure assumptions.

THE INDUSTRY PERFORMS A TRANSPORTATION SERVICE.

There is no evidence whatever to sustain the *second finding:*

"that the industry performs no service beyond such points of interchange for which the respondent carriers are compensated in their interstate line-haul rates;"

The service performed by the industry, under the allowance, is fully described of record by the witnesses. That service will be seen to be the movement of the cars to and from the so-called *interchange* tracks, from and to points of loading and unloading in various parts of the refinery grounds. The cars are left by the carriers on

or taken by each of the carriers from, the so-called interchange tracks, by virtue of the arrangement made between the carriers and the Magnolia Petroleum Company, under which the industry acts as the carrier's agent in performing the spotting services; and therefore the cars are left near the gate of this plant by the carrier engines, unclassified, and to be sorted out by the industry engine before placement. (R. 280, *et seq.*)

There is nothing in the Commission's description of the services performed in the Chaison refinery, as set forth in the 10th supplemental report, to indicate that the tariffs of the carriers providing the allowance (quoted above) inaccurately describe the situation, or warrant the conclusion that the service performed by the Magnolia engines is a plant service and is not a service of transportation.

Finally on this feature, we point to the language of the tariffs voluntarily filed by the carriers, in which this allowance is provided. (R. 695) They should be *the best evidence* of what the carriers considered was their obligation in the way of terminal services under the established rates.

NO UNJUST PREFERENCE TO APPELLEE.

The *fourth feature* of the formal findings (R. 579) is to the effect that by the payment of an allowance to the Chaison refinery, the carriers are providing the means by which the Magnolia Petroleum Company enjoys a preferential service, not accorded to shippers generally.

There are three respects in which this finding is palpably erroneous.

First, there is no evidence to warrant the conclusion that the allowance produces in fact any preference in

service, for the simple reason that the net result of the allowance is that the carrier thereby bears the cost of the placement or spotting service, or part of that cost. This is the only result, since the allowance is less than the cost and yields no profit. (R. 290, 297; also Exhibits Nos. A-75, A-76, A-77 and A-121, R. 403, 4, 5; 449)

Second, while the Commission speaks of this as a preference, it does not state that it is an *unjust* preference. It is a familiar principle that not all preferences and discriminations are unlawful but only such as are unjust and unreasonable.

Third, the very term "preference" presupposes unequal or different treatment of two or more persons, or companies, or species of traffic, one of whom has the benefit and the other the disadvantage. We find in this entire record no reference to any petroleum refinery being discriminated against by reason of the allowance paid and service enjoyed at the Chaison refinery.

Erroneous Statements of Fact.

None of the statements in the report set forth facts from which it could be concluded that the carrier's obligation is limited as the Commission declares, or that if so limited there is any illegality in the resulting gratuitous service. Moreover some of the statements are *unfair*, and wholly unjustified by the evidence.

ALLEGED COMPETITIVE REASONS BEHIND THE ALLOWANCE.

For example, the report states (R. 578):

> "Keen competition existed between the T. & N. O. and the K. C. S. for this business. Prompt attention was given the fact that unknown to the K. C. S., the T. & N. O. by meeting the needs of the industry had

placed itself in an advantageous position to secure traffic, and upon receipt of that letter the vice-president of the K. C. S. advised the industry by long-distance telephone that his company would file a similar tariff."

The foregoing statements are quite unfair, particularly in view of the silence of the report as to the submission of the matter by the Texas and New Orleans Railroad and the appellee jointly to the Commission and the obtaining of its tacit approval before the allowance was instituted, (see below).

The foregoing quotation is preceded by a description of the so-called negotiations which led to the establishment of the allowance and which it is stated were conducted entirely with the Texas and New Orleans Railroad. This fact would hardly be strange, (if it were true), in view of the circumstance mentioned in the report, that about 75 per cent of the traffic of the plant was handled by the Texas and New Orleans.

If the conferences had been entirely with the Texas and New Orleans Railroad and if the other carrier had not been consulted and if the Kansas City Southern had granted the allowance for no other reason than to meet the condition imposed by the Texas and New Orleans action, such facts would not make unlawful the payment of the allowance so long as the service performed by the industry is a transportation service and so long as the allowance is published in the tariff and not unreasonable in amount. We submit it is not fair to take the evidence of the various witnesses who participated in the negotiations and state this as though it were a situation where *traffic influence*, referred to as *keen competition*, led to an arrangement which is to be regarded unfavorably for that reason, although shown by uncontroverted testimony to be in the interest of efficiency and economy.

Analysis of the evidence of record, however, will not support the Commission's statement that the negotiations leading to the allowance were conducted entirely with the Texas and New Orleans Railroad.

The Commission's Attorney and its presiding Director of Service devoted a great deal of time to examination of the witnesses concerning the discussions and correspondence as though *the spirit* of the industry's demand, or *the desire* of carrier officials to please or to avoid displeasing a patron, were much more important than the facts as to the service actually performed and the reasonableness and legality of the allowance therefor. But the examination of the witnesses did not disclose any impropriety in the so-called negotiations.

Mr. W. M. Maddox, Traffic Manager of the appellee, testified fully and freely concerning these negotiations (R. 284, *et seq.*); and the facts also were fully and freely discussed by carrier witnesses.

Bearing in mind that the matter was submitted informally to the Commission by both parties in a letter dated October 28, 1922 (Exhibit No. A-73, quoted below), and that the allowance was not established and made effective until May 25, 1923, we trust the court will see the significance of the fact stated by Mr. Maddox that when he first conferred with Southern Pacific officials, in December, 1921, at Beaumont, he had tried to get in touch with the Kansas City Southern representatives, *with whom he had discussed the matter in October.* (R. 285)

Running all through the description of the negotiations are repeated references to discussions with the Kansas City Southern which, as the Commission's report recognizes, only had about one-fourth of the traffic in and out of the industry and in that respect was naturally a minor factor in the situation.

SPOTTING NOT DONE SOLELY AT INDUSTRY'S CONVENIENCE.

This statement appears in the report (R. 579), in a paragraph which we have heretofore quoted in full:

> "Carriers have no obligation under their line-haul rates, to perform service beyond an agreed point of interchange *solely for the convenience of an industry.*"

We do not challenge that statement, but submit that it is wholly irrelevant to anything before the Commission, or before this Court.

The appellee has never contended, nor does anyone else contend, that either the Texas and New Orleans or Texarkana & Fort Smith Railroad is obligated to perform a service at the Chaison refinery, *solely for the industry's convenience.* There is no evidence of anything being done at that plant at any time, solely for the convenience of the industry.

The Failure to Consider Relevant and Material Evidence.

There are three important features of the evidence bearing on the situation at the Chaison refinery which are completely ignored in the report, namely, (a) that the practice and arrangement has made for economy and efficiency; (b) that the record establishes an absence of *interference* as an element to be considered, and (c) that the allowance was submitted to and had the informal approval of the Interstate Commerce Commission, and was authorized by formal order of the Railroad Commission of Texas. These facts completely refute any possible theory upon which the Commission might have found an illegal practice and destroy the inferences which the Commission mysteriously draws from the ambiguous maps and statistics.

THE PRACTICE MAKES FOR ECONOMY AND EFFICIENCY.

The uncontradicted evidence of every witness who testified relative to the situation at the Chaison refinery, is that economy and efficiency are served, both for the carrier and for the industries, by having the Magnolia Petroleum Company do the work of spotting cars. The report ignores this evidence and the indisputable exhibits of cost studies.

Exhibits A-75 to A-77 are detailed statements of actual costs for the period from June 1, 1923, through the year 1931, and show various averages of actual cost sustained by the refinery in performing the placement services, of from $1.02 per loaded car to $1.38 per loaded car. (R. 403-5)

Witness W. N. Deramus of the Kansas City Southern system, mentioned the cost disclosed by their study at this refinery as $1.01 per car for a certain period. (R. 335) He repeatedly testified that this allowance was less than carrier's cost and represented an economy to the carrier. This will illustrate his answers (R. 339):

> "A. If I recall correctly, Mr. Hagerty, consideration was given to whether it would be more satisfactory and less expensive for us to go in and take over the switching ourselves or make the same allowances as the Southern Pacific were making, and as I remember we elected to make the same allowance because we felt it would save us money and it would be more satisfactory to the industry."

Witness T. H. Meeks, of the Texas and New Orleans Railroad, testified (R. 298):

> "It is the carrier's obligation in this part of the country to put the cars where the shipper wants them."

Further, in response to questions by the Commission's attorney, Mr. Hagerty (O. Tr. 5729-30), the answer of Mr. Meeks was most emphatic:

> "A. The service at this plant is no different from the spotting service at other industries that we switch, either with our own engines or hire them to switch. Generally speaking, it is about the same."
>
> * * * * *
>
> "Q. I will not ask you to do it, but your answer to your counsel's question, that it would cost you more to perform the service with your own power than to pay the industry an allowance, was predicated upon your experience and judgment?
>
> A. Yes, and my positive knowledge as to what we would have to do if we took over the operations at the plant in whole, in so far as our obligation goes."

RECORD ESTABLISHES ABSENCE OF INTERFERENCE.

The supplemental report directed against the *Chaison refinery*, disregards entirely the uncontradicted affirmative proof that the performance of spotting service by the carriers would not entail interference from plant operations, of the character contemplated by the Commission's original decision.

The allowance was first established by the Texas and New Orleans Railroad. It is therefore of interest to note the following categorical answer by that company in its return to the Commission's questionnaire (R. 154):

> "Question 9:
>
> Are allowances of the nature described in question 5 hereof now being made *to any industries* which, because of interference by respondent's power with the industrial plant operations, or operation of plant power on the private industrial tracks in intra-plant services, have definitely refused or expressed unwillingness to permit the entry of respondent's power upon the private industrial tracks for the purpose

of performing the described services? If so, specify them by name, location, and character of business?

Answer:

No."

The testimony of the several witnesses, without conflict or contradiction and therefore deserving acceptance, fairly requires a finding by the Commission that there would be no interference if the carriers performed the spotting service. We rely on the entire testimony of Witness Deramus, repeatedly herein referred to; and on the testimony of Witness Meeks. (R. 298)

Accepting the Commission's definition of interruption or interference, 209 I. C. C. 11, at p. 44, the testimony does not show that either—

—the desires of the Magnolia Petroleum Company,
—the disabilities of the plant,
—the manner in which the industrial operations are conducted,
—the arrangement or condition of the tracks,
—weighing service,

or any similar circumstances would prevent the Texas and New Orleans from reaching the points of loading or unloading within this plant at its ordinary operating convenience, if it were to undertake to perform placement services with its own locomotives instead of hiring the work done by the refining company.

Any conclusions to the contrary must be based on pure assumptions rather than any evidence of probative value in the record.

COMMISSION APPROVAL OF ALLOWANCE.

The report mentions the fact that the allowance to this appellee, as well as to certain other refineries, was submitted to and formally approved by the Railroad Commission of Texas. But it gives no recognition to the breadth and meaning of that Commission's formal order and takes no cognizance of the public hearing held by it.

Moreover, the report preserves a discreet silence concerning the submission of this matter by the carrier and the Magnolia Company jointly to the Interstate Commerce Commission out of a desire to know "whether or not such an agreement would be objectionable or in any sense illegal."

It seems quite natural that having made charges of preferences and rebates the Commission would not emphasize the openness and candor with which the parties proceeded and the fact that they had submitted the question to the two public tribunals invested with authority to act thereon, notably the State and Federal Commissions. However, we submit that the charges are completely refuted thereby, and the Commission in relying on such charges is itself guilty of conduct not conforming to its record as an impartial administrative tribunal.

In Exhibit A-73, the Magnolia Petroleum Company and the Texas and New Orleans Railroad, by its general counsel, wrote the Interstate Commerce Commission under date of October 28, 1922, describing the service, stating the facts fully and asking for an informal expression of the Commission's opinion. (R. 397-8)

The Commission replied promptly in a letter by the Secretary, addressed to the Magnolia Petroleum Company, (R. 398) reading as follows:

"The Commission has received your letter of October 28, regarding the basis for adjusting accounts between your company and the Texas & New Orleans Railroad Company for service proposed to be performed by your company in moving carloads of freight that under the transportation conditions should be moved to placement by the railroad at your plant at Chaison, Texas.

The basis proposed is compensation to your company at the rate of $10 per engine hour for this service. Practically all the cases the Commission has had to deal with involving compensation to shippers by carriers for the performance of switching service have been on the basis of a charge per car and they are represented by *U. S. Cast Iron Pipe & Foundry Co.* v. *Director General,* 59 I. C. C. 59, and *Pittsburgh Forge & Iron Co.* v. *Director General,* 59 I. C. C. 29.

If the proposed basis of $10 per engine hour as compensation to your company for service that otherwise should be performed by the railroad represents a reasonable allowance for the service, it is not seen that that basis would result in a violation of the law. This statement is predicated on the idea that the allowance will be represented by actual service performed during the period covered by such allowance. It will be necessary that the provision for the allowance be published in a tariff and filed with the Commission. Your attention is invited to the enclosed copy of conference ruling 360."

The Commission's conference ruling 360, referred to by the Secretary, will be found reported in Vol. 45 I. C. C. Rep., on p. 108 of the Appendix:

"May 17, 1912.

360. ALLOWANCE UNDER SECTION 15—*Held,* That an allowance purporting to be made under section 15 must be regarded as a concession from the rate unless duly published by the carrier in its tariffs and thus made available to all shippers furnishing a like facility or performing a like service of transportation in connection with their traffic."

The Commission has gone a long way from this long standing administrative ruling, when it holds in the present cases, that the allowances are rebates, although specifically published!

The submission of the matter to the Commission, which resulted in the foregoing reply, is worth bringing to the court's attention in full. It is Exhibit A-73, (R. 397-8), and reads as follows:

"Houston, Texas, October 28, 1922.

"Interstate Commerce Commission,
Washington, D. C.
Gentlemen:

At Chaison, Texas, a station on the line of the Texas & New Orleans Railroad Company, the Magnolia Petroleum Company has an oil refining plant. The Texas & New Orleans Railroad Company operates freight trains through to said station, handling cars to and from team tracks and loading and unloading tracks of other industries. It has for some time, however, been the practice of the said Railroad Company to shunt on to the track of the Magnolia Petroleum Company at the switch-head all inbound cars for said Company and to pick up at that point all outbound cars from shipper's plant, and shipper has operated its own switch engine which has handled cars to and from the switch-head to loading and unloading tracks of shipper's plant.

This service, it is admitted, *is a service which should be performed by the Railroad Company,* and the Magnolia Petroleum Company, finding the performance of such service to be growing burdensome with increasing traffic, has formally requested the Texas & New Orleans Railroad Company to perform such spotting service. The Railroad Company, after a survey of the situation; admits that the service requested is one which it is the duty of carrier to perform, but, as a matter of convenience to both parties, and in order to avoid delays to trains of the Railroad Company which would be occasioned by the performance of this spotting service by said trains, has proposed to Magnolia Petroleum Company that

shipper continue to perform said spotting service for the Railroad Company and accept compensation therefor from said carrier at the rate of Ten Dollars ($10) per switch engine hour, upon the basis of a daily requirement of two switch engine hours for such service, it having been determined after somewhat comprehensive tests that Ten Dollars ($10) per hour is less than the actual cost of operating a switch engine in this service and that the time required for a switch engine to perform this service is somewhat in excess of two hours per day.

This proposal is acceptable to the shipper, but before entering into an agreement upon the basis mentioned, we wish to be advised by the Commission whether or not such an agreement would be objectionable or in any sense illegal.

Yours truly,
MAGNOLIA PETROLEUM COMPANY,
Dallas, Texas.
By W. M. MADDOX,
Assistant Traffic Manager.

We entertain no doubt of the legality of the proposed arrangement, but, as the Magnolia Petroleum Company desires to obtain in an informal way the view of the Commission on the matter, we join that Company in requesting the opinion of the Commission.

TEXAS & NEW ORLEANS RAILROAD CO.
Houston, Texas.
By BAKER, BOTTS, PARKER & GARWOOD,
General Attorneys."

The court will observe that the foregoing letter fairly portrayed the situation, and if there had been anything questionable about the proposed arrangement, the Commission's reply ought to have warned the parties, to say the least. It is quite apparent that the Commission was really approving the arrangement.

This record shows no changes in conditions and indicates no facts which are not as set forth in the joint submittal to the Commission. Therefore, the fact that

the Interstate Commerce Commission, as well as the Texas Railroad Commission, approved of the establishment of this allowance is of not a little persuasive force.

The Texas Company.

(Houston Plant)

No. 692 in the court below, No. 530 on appeal.

Appellee's refinery at Houston, Texas, is served by Texas and New Orleans Railroad Company and by the Port Terminal Railroad Association, which is the terminal agency for various trunk line roads. The allowance, which was condemned by the Commission's order, was 90¢ per loaded car and is provided in published tariffs of each of the carriers, which define explicitly the service for which this payment is made as consisting:

> "of switching carload freight, on which line-haul transportation has been or will be performed, between loading or unloading tracks at the plant of The Texas Company, on the one hand, and track connection with the Texas and New Orleans Railroad at Houston, Texas, on the other hand."

Appellee's plant was dealt with in the 24th supplemental report, 209 I. C. C. 767 (R. 606).

THE RECORD RELATING TO THE HOUSTON REFINERY.

The principal evidence in regard to the several Texas refineries now before the court was taken at the sessions held by the Commission at Galveston, Texas, on May 16 to 19, 1932. It comprises the testimony of the following witnesses relating directly to the *Houston refinery* of The Texas Company:

Charles Ervin, Assistant Manager, Traffic Division of The Texas Company covering. (R. 301 to 303; also 317-8)

J. M. Fleming, Superintendent of Transportation of this company for Southwestern District. (R. 318)

C. J. Smith, with Houston Works of The Texas Company. (R. 299)

T. H. Meeks (recalled), Assistant to General Manager, Texas and New Orleans Railroad. (R. 303)

W. B. Drake (recalled), Superintendent, Port Terminal Railroad Association. (R. 305)

P. H. Coon (recalled), Assistant General Freight Agent, Missouri Pacific Lines. (R. 310)

L. A. David (recalled), Assistant General Manager, same system. (R. 310)

J. H. Tallichet, of counsel for Southern Pacific Lines, testifying. (R. 311)

J. S. Hershey (recalled), General Freight Agent, Santa Fe. (R. 313)

D. C. James, of the Burlington-Rock Island Railroad. (R. 314)

Relating to conditions at other Texas refineries and therefore relating indirectly to the general situation affecting the Houston refinery is the testimony of various witnesses taken at the same session, beginning at R. 252 and extending through to R. 330.

The evidence of officials of the Kansas City Southern Railway System regarding the Texas refineries was received at a later session of the Commission held in Kansas City on May 23, 1932.

The only exhibits relating particularly to the Houston refinery of The Texas Company were: No. A-80, being a blueprint map of the tracks at the Houston Works (R. 405); No. A-83, being a copy of the order of authority of the Railroad Commission of Texas approving the allowance to this refinery (R. 405) and No. A-87, statement of switching cost at the Houston Works. (R. 409)

ANSWERS FILED BY RESPONDENT CARRIERS.

The principal carriers defendants below filed answers in which they suggest that the cause really involves a controversy between the plaintiff (appellee) and the Commission, in which these defendants are not necessary parties who should be required to admit or deny the allegations of the bill. They say, however:

> "If required to answer to said sections, they alleged the facts to be that the allowances made by them, or any of them, and described in the reports of the Interstate Commerce Commission in Ex Parte 104, Part 2, were and are no more than the cost to plaintiff of performing the described service and less than what it would have cost these defendants, or any of them, to perform the same; that when said allowances were published in the tariffs described in said bill or any preceding tariffs, these defendants believed and yet believe that it was their duty as common carriers to perform the services for which said allowances were made; and that there was, before the Interstate Commerce Commission in said Ex Parte 104, Part 2, no evidence or no substantial evidence to the contrary or to the effect that the duty aforesaid was that of plaintiff."

CONTENTIONS IN BRIEF FOR APPELLANTS.

Under the heading "the first Texas Company case," on pages 102 to 108 of opening brief for appellants, is a discussion of the Commission's report and certain of the facts regarding the Houston refinery of the Texas Company. The brief expressly admits that the track layout is comparatively simple and that the construction is such that the carriers could safely operate over them. But the discussion ends with the suggestion that "plaintiff's suit should be dismissed for want of equity", and this on the ground that the findings are sufficient to support the report and the evidence supports the findings.

This we deny and we ask the Court to observe that the meager references to the record in the appellants' brief are to testimony, largely hearsay, which subsequently was controverted by competent testimony.

GENERAL CONDITIONS IN THE REFINERY.

The report describes the Houston refinery as containing 17 tracks, aggregating about 22,500 feet in length, which are grouped and occupy a small section in the south end of the industrial property. It states (R. 606):

> "There are about 15 spotting locations within the plant, all closely adjacent to the interchange tracks used by the two carriers, and it requires only a slight additional switching movement beyond that now performed by the carriers to place the cars for loading or unloading."

Appellants refer to this as one of the basic facts upon which the Commission bottomed its order (p. 103).

Taking the statement at its full face value, the implication is that the allowance may not be justified because there is no real service being rendered by the industry and therefore the carrier is not being saved work or operating expense when it engages The Texas Company to perform the "slight additional switching movement" beyond the so-called interchange tracks.

As a part of the same thought the further statement is made in the report (R. 606):

> "At all times when the refinery has been in operation under the ownership of the Texas Company the switching has been performed by that company's small locomotive using a switching crew of only two men."

In a subsequent paragraph of the report (R. 606) appears the following statement:

> "From an exhibit of record the track layout at this plant appears to be comparatively simple, and the

tracks are in condition to allow respondents to operate thereover. There appears to be no reason why either the T. & N. O. or the Port Terminal could not perform the spotting service so far as the physical conditions are concerned."

The main thought which seems to lie behind the foregoing statements is one sought to be worked out in questions by the Commission's staff but not supported by the answers of the witnesses, *i. e.*, that the service rendered is not commensurate with the allowance paid. We will review the testimony briefly:

It is true that there are about 15 spotting locations within the plant and that there are about 22,500 feet of track. These facts appear from the plant map, Exhibit No. A-80 (Rec. 405), and from oral testimony in connection therewith (R. 301), where Witness Smith describes the service performed at the Houston refinery.

But it is not true that these spotting locations are *"all closely adjacent to the interchange tracks"*.

Glancing at that map, Exhibit A-80, the 15 spotting locations will be found indicated by circles. There are about four miles of track within this plant, a fact not to be lost sight of in this connection. If all the industry did was to move the cars from the so-called interchange tracks directly to the spots of loading or unloading, the service would be much simpler than it is. Cars have to be *classified* for this industry, as for any other industry, not merely placed at random, regardless of the contents in them or of the character of goods to be loaded therein. Such classification service, the distributing and assembling of cars, is a considerable labor at all industries and at this industry it is saved to the carriers by the arrangement here made. The testimony is uncontroverted on that point.

Witness J. M. Fleming, Superintendent of Transportation for The Texas Company, testified (Or. Tr. 5769):

"Q. Would you say that the Southern Pacific power could operate your tracks efficiently?

A. I think so.

Q. Now, take the Southern Pacific interchange track as shown on exhibit A-80, at the point just below or just above the point 1 or 1-A, how much more of a movement would it be for the Southern Pacific to shove to the loading track instead of to the other track?

A. I don't think we show the full length of their passing tracks. You see here, they run out right here—here is the loading rack here.

Q. *I am assuming now,* from what the previous witness testified, *that the interchange is made on the track adjacent to the loading track.* How much of an additional haul would it be *for the Southern Pacific to shove it to the loading track instead of to the interchange track?*

A. Well, I think they can answer that better than I could. I could give you a sort of an idea on it. The tracks are there; they extend quite a distance beyond; of course, they would have to go all the way down to put them into the track.

Q. They have to do that?

A. They merely let them down the hill, as we call it, to let them in on this interchange track, pick up the loads and go back up town."

In other words, the witness indicated a very simple and easy service *by the Southern Pacific* to leave the cars on the interchange tracks, but did not subscribe to the theory of the questions that it would be very simple for the Southern Pacific to shove the cars to the loading tracks, even in the case of the nearest loading locations, namely, Nos. 1 and 1-A.

A further effort of the Commission's representatives to show that the service done by the refinery engine does

not amount to much occurred in the examination of Witness Smith (Or. Tr. 5741):

> "Q. So all the service that your power would perform in traffic handling from those spots as compared to service performed by the Port Terminal, would be a matter of 400 or 500 feet to the spots?
> A. No, sir."

This appeared in a series of questions dealing with the fifteen separate loading and unloading locations, some of which were described as 1,000 feet, 1,300 feet, 3,000 feet, etc. It will be observed that the direct implication of the question was denied by the categorical *no* of the answer.

The following appears on Or. Tr. 5743:

> "Q. Anything that you load at 1 and 1-A, picked up by your engine on 1 and 1-A, that goes out over the T. & N. O., it is there, just across the switch on the T. & N. O. track?
> A. That is right.
> Q. A distance of how much?
> A. A switching distance of about 3,000 feet, something like that.
> Q. Three thousand feet. What is the length of that track designated as 1?
> A. That is 11 car lengths.
> Q. Eleven car lengths—about 365 feet?
> A. It is according to the car; the track itself is about 1,000 feet long, but we have eleven car spots there."

Of further significance is the testimony of the carrier operating witnesses in the course of their examination by the Director of Traffic.

T. H. Meeks, testified as Assistant General Manager of the Texas and New Orleans Railroad (R. 304):

> "It would not take us very long to spot the cars at points designated on the map, Exhibit A-81, but that is only part of the work. It wouldn't cost 90

> cents a car to spot them at points 1 and 1-A, but we allow 90 cents on everything that is done in the plant for the account of the railroad."

The witness had previously testified that they had ascertained the cost to the industry of performing the spotting service was 97 cents and granted the allowance of 90 cents. He testified further (R. 304):

> "By using The Texas Company's transportation cost and their wages, we figure a cost to the T. & N. O., less depreciation, of 97 cents. That is less than what it would cost the T. & N. O. to do the switching. If we had to do the switching, it would be necessary to assign another engine between Clinton Dock and the Texas plant to pick up and deliver cars on the industry's interchange tracks. If we had to do the switching within the plant, we could not cover all of that work with one engine; in other words, we would have to assign another engine and crew in that territory which would probably only spend part of its time at The Texas Company plant and the rest of the time it would be engaged in other work in that general vicinity."

Certainly this means that the service performed by the plant engine and crew for the 90 cent allowance is substantial; and that the carrier is thereby saved the doing of a substantial work with its own engine.

We again remark the inconsistency of the foregoing expressions of the Commission, for here they appear to criticize the arrangement on the ground that the service performed for the allowance does not amount to much, (disregarding the uncontradicted testimony of carrier witnesses that paying the allowance saves them money as against performing the service themselves), while as a general proposition, the original report seems to hold that an allowance is not proper where the service is in excess of the equivalent of simple switch placement or team track spotting service. This patent confusion of

theory demonstrates the complete disregard for the record which attended the use in all cases of the same stereotyped findings, and of which appellees complain.

ALLEGED COMPETETIVE REASONS BEHIND THE ALLOWANCE.

After referring to the establishment of the allowance of 90 cents per loaded car by the Texas and New Orleans Railroad on December 8, 1929, the report states (R. 607):

> "When the Port Terminal connected with the plant, the Texas Company, because of interference with plant operations and fire hazards, refused to permit the entry of the Port Terminal locomotives within the plant to perform spotting service. It was therefore necessary for the member lines comprising the Port Terminal to meet the competition of the T. & N. O. by granting an allowance of the same amount, which became effective by tariff publication of the respective lines comprising the Port Terminal, except the T. & N. O., September 17, 1931."

Some color for these statements would be found in the returns filed by the carriers to the Commission's questionnaire, issued January 14, 1932, prior to the hearings herein, but these features of the questionnaire were corrected and clarified by the oral testimony. The returns were sent up as original and are not in the printed record. (R. 155)

The return filed by the Missouri Pacific Lines was signed by Messrs. L. A. David and P. H. Coon both of whom were witnesses at the Galveston hearing when the return was received in evidence. We reproduce the following extracts from that return, as pertinent to present discussion:

> "The 90¢ per car allowance made the Texas Company, was not made as result of a cost study at the Texas Company's plant by these lines. This allowance was made by the Texas & New Orleans Rail-

road, at the time it served this industry exclusively. With the authority granted by the Commission under Finance Dockets 8620 and 8791, it placed these facilities within the switching limits of Houston, and gave other carriers entering Houston the right to serve the properties of the Texas Co., through a switching arrangement.

"It was therefore necessary that the 90¢ allowance which had been established by the T. & N. O. be made by the other lines in order to meet their competition."

In other words, when the Missouri Pacific Lines first gained access to the *Houston refinery,* it found this refinery was receiving an allowance for spotting service from the Texas and New Orleans Railroad. Consequently, it may be said that "competition" required the granting of this allowance by the Missouri Pacific and other lines using the new entrance afforded by the Port Terminal Association. What this emphasizes, however, *is the lack of carrier-competitive influence* in the matter, since the allowance was *first granted* when *only one carrier* served this refinery and therefore enjoyed the undivided patronage of that refinery.

Witness L. A. David, who signed the questionnaire return for the Missouri Pacific Lines, testified (R. 311):

"The allowance was recommended by the committee who investigated the trackage, *et cetera,* in the face of the report made by Mr. Drake that the committee would not permit the carrier's power to enter the plant. The allowance was made to the oil company as an economical proposition. The allowance was made because of competition only after and because of economies effected as recommended."

WHETHER THE INDUSTRY PREFERS TO PERFORM THE SERVICE.

The Commission further states in the report (R. 607):

"The record is persuasive that the Texas Company does not desire the performance of any further service by respondents than it now receives."

This statement is not supported by the evidence. Nor does the record sustain the further statement, which we are *italicising,* in the following quotation (R. 607) from the supplemental report:

> "When the Port Terminal connected with the plant, the Texas Company, because of interference with plant operations and fire hazards, *refused to permit the entry* of the Port Terminal locomotives within the plant to perform spotting service."

The only foundation of these statements is certain hearsay statements appearing in the return to the Commission's questionnaire filed by the Missouri Pacific Lines, of which a copy is part of the original record before the court, by stipulation. (R. 155)

These statements in the return are contradicted or refuted by the oral testimony of record, as is recognized by appellants—see testimony quoted on pp. 93-94 of their brief.

Both officials of the Missouri Pacific who signed the questionnaire admitted that the statements in it were due to misunderstanding and not based on anything from a responsible officer of The Texas Company:

W. B. Drake, Superintendent of the Port Terminal Railroad Association, at first testified (Or. Tr. 5635), that his company does not go into The Texas Company plant because "they do not desire us in there". But a few moments later he changed this statement (Or. Tr. 5636):

> "Q. There are no other industries among them that refused to permit you to enter the plant?
>
> A. No, sir, other than the American Petroleum Company and The Texas Company. I might modify that, I don't know that they actually refused. *The Texas Company prefers to do their own work.* I would rather put it that way."

Later in his examination, appears this statement (R. 306):

> "Q. Are there any other reasons that have been assigned to you as to why The Texas Company prefers to do their own spotting?
>
> A. No, sir; my information comes from the superintendent of their plant, that they prefer to do their own spotting because it is convenient for them to have an engine available at all times."

All of this was before any testimony was given by employees of The Texas Company. Subsequently Mr. Drake was recalled, the day following his first testimony; and the record reads as follows (R. 309-310):

> "I would not have any authority to deal with the Texas Company or its officers with respect to whether they wanted their switching done by the Port Terminal lines and, if I gave that answer previously, I misunderstood the question. It was my understanding that anything the superintendent said to me was sort of easing me off in a polite way. I did not have any authority to negotiate with the superintendent for performing the switching. I visited the Texas plant to increase the volume of our business and to find out how much switching we would have to do. At that time, the superintendent said he would prefer to continue to handle the switching as he had in the past."

The Assistant General Freight Agent of the Missouri Pacific, Mr. P. H. Coon, one of the two signers of the return to the questionnaire, testified with respect thereto as follows:

> "The information that we could not enter upon The Texas Company's property, if we so elected, came through Mr. Drake, who has previously testified, and my understanding of his testimony is that we were possibly misinformed as to that statement."

Operating Officer L. A. David, who also signed the return, was questioned by the Director of Service with respect thereto and answered as follows (R. 310-311):

> "Q. Mr. David, I understand that the response to the questionnaire made by the Missouri Pacific, in so far as it indicates that The Texas Company refused entry of your power for the purpose of performing the described service, was based upon information furnished by you, which you secured through Mr. Drake. Is that correct?
>
> A. Partially correct. The information was secured not only through Mr. Drake, but through our executive offices in handling the negotiations; they handled the negotiations for the Port Terminal, being a part of the Board of the Port Terminal Association. However, my understanding is that the information that they conveyed to me was given to them by Mr. Drake, as well as he gave it to me.
>
> * * * * *
>
> "It is possible that the Superintendent of The Texas Company misunderstood the question asked by Mr. Drake and his reply might have referred to intra-plant switching and not railroad switching."

We submit, therefore, that, contrary to the statements made on pages 107 and 108 of appellants' brief, the record before the Commission contains no *competent* or substantial evidence that the appellee would not permit the carriers to perform the placement service, if they preferred to do so, with their own power. The fact that the present arrangement serves for efficiency in supplying the transportation requirements of this industry, without burden on its industrial operations and therefore that its officers may prefer the present arrangement, does not make such arrangement unlawful. Nor does that fact in any way lessen the importance of the further fact that the arrangement is economical for the carriers so that they, too, have every good reason for preferring this arrangement rather than one which would cost them more money.

The Evidence Contradicts the Commission's Report.

There are three important features of the evidence bearing on the situation at the Houston refinery which are completely ignored in the 24th supplemental report, namely, (a) that the practice and arrangement has made for economy and efficiency; (b) that the record establishes an absence of *interference* as an element to be considered, and (c) that the allowange was authorized and approved by formal order of the Railroad Commission of Texas and had the informal approval of the Interstate Commerce Commission.

THE PRACTICE MAKES FOR ECONOMY AND EFFICIENCY.

If the Commission's supplemental report had reviewed the testimony, in full, instead of merely following the rather stereotype form of all the supplemental reports in mentioning certain features only, it would have been stated therein that the uncontradicted evidence of every witness who testified relative to the situation at the Houston refinery, is that economy and efficiency are served, both for the carrier and for the industries, by having The Texas Company do the work of spotting cars. The report ignores this evidence.

We ask the Court's attention to the uncontradicted testimony of the carrier witnesses as well as of the witnesses in the employ of The Texas Company, definitely establishing that the allowance is less than it would cost the railroads to perform the service which they admit comes within their assumed obligation and common practice:

Witness T. H. Meeks, Assistant General Manager of the Texas and New Orleans Railroad, so testified. (R. 303)

The evidence is that the Texas and New Orleans Railroad made a cost study in January, 1930, from which it was determined that the cost of performing the spotting service which it has delegated to The Texas Company would be $1.26 per loaded car, as against the allowance of 90 cents. (Or. Tr. 5765)

The return of that company to the Commission's questionnaire, which may be accepted as stating the company's policy in such matters, contains the following significant answer:

"Question 11:

To the extent that allowances may be made by respondent to industries which, with their own power perform terminal services on their plant tracks, state what rule or rules govern the determination of whether such allowances are to be granted or denied, and whether under such rules the controlling considerations are uniformly applied in reference to each and every industry; also what, if any, exceptions prevail?

Answer:

In determining whether allowances are to be granted or denied consideration is given to the following factors:

(1) Whether the service is that which carrier is required to perform under applicable line haul tariffs.

(2) Whether in the opinion of respondent's operating officers this service can be performed more economically by industry than by respondent."

RECORD ESTABLISHES ABSENCE OF INTERFERENCE.

The supplemental report directed against The Texas Company allowance, *Houston refinery,* disregards entirely the uncontradicted affirmative proof that the performance of spotting service by the carriers would not entail inter-

ference from plant operations, of the character contemplated by the Commission's original decision.

The allowance was first established by the Texas and New Orleans Railroad. It is therefore of interest to note the following categorical answer by that company in its return to the Commission's questionnaire, in evidence before the court:

> "Question 9:
> Are allowances of the nature described in question 5 hereof now being made to any industries which, because of interference by respondent's power with the industrial plant operations, or operation of plant power on the private industrial tracks in intra-plant services, have definitely refused or expressed unwillingness to permit the entry of respondent's power upon the private industrial tracks for the purpose of performing the described services? If so, specify them by name, location, and character of business?
> Answer:
> No."

It may be true that upon subsequent entry of the other trunk lines into this refinery, through the medium of the Port Terminal Association, some interference as between the engines of the several railroads, *one railroad against another*, might occur if each were performing spotting service. Surely that would not make unlawful an allowance which was entirely proper when only one carrier served the plant and therefore such interference between railroads could not arise.

The railroad witnesses testified definitely that there would be no interference encountered if the railroads performed the service and such was the testimony also of the industry witnesses. (See Or. Tr. 5773; 5776, etc.)

The Commission's supplemental report does not find affirmatively that interference would be encountered if

the railroads were to perform the switching at the Houston refinery; but it does contain statements of indirect implication to that effect. The evidence justifies and requires an affirmative declaration by the Commission that there would not be involved any interference or interruptions of the character described in the original report of the Commission, 209 I. C. C. 11, at page 44.

COMMISSION APPROVAL OF ALLOWANCE.

The allowance to appellee's Houston refinery was approved by the Railroad Commission of Texas in a formal order entered upon the application of the railroads serving the refinery. The text of this order is of record as Exhibit A-83 (R. 405) and the order recites the basis upon which the allowance of 90 cents was approved.

The further evidence is (R. 407) that a definite factor in the granting of the allowance to the Houston refinery was the fact that the Interstate Commerce Commission had rendered its informal ruling concerning the allowance already established for the Magnolia Petroleum Company; and the Secretary of the Commission had written:

> "If the proposed basis suggested as compensation to your company for service that otherwise should be performed by the railroad represents a reasonable allowance for the service, it is not seen that that basis would result in a violation of the law. This statement is predicated on the idea that the allowance will be represented by actual service performed during the period covered by the allowance. It will be necessary that the provision for the allowance be published in a tariff and filed with the Commission."

Gulf Refining Company.

No. 693 in the Court below, No. 530 on appeal.

This industry is covered by the 21st supplemental report, 209 I. C. C. 756. (R. 641) The appellee's refinery is located at Port Arthur, Texas, and is served by the Texas and New Orleans Railroad Company and the Kansas City Southern Railway Company. The allowance, condemned by the Commission's order, is 90 cents per loaded car and is provided in published tariff of both carriers. (R. 702)

These tariffs are of identical form and similar text to the tariffs providing allowances to other refineries, see p. 151, *supra,* for example.

THE RECORD RELATING TO THE REFINERY AT PORT ARTHUR.

The principal evidence in regard to the several Texas refineries now before the court was taken at the sessions held by the Commission at Galveston, Texas, on May 16 to 19, 1932. It comprises the testimony of the following witnesses relating directly to the *Port Arthur refinery* of Gulf Refining Company:

The presiding Director of Service formally called the matter of the Gulf Refining Company, Port Arthur refinery, on May 16; and the following witnesses then testified:

R. L. Jones, Yardmaster of the Port Arthur refinery. (R. 252)

C. L. Franklin, Traffic Clerk at the Port Arthur refinery. (R. 258)

J. C. Beck, Assistant General Traffic Manager for appellee. (R. 259)

T. H. Meeks (recalled) Assistant to General Manager, Texas and New Orleans Railroad. (R. 321)

S. G. Reed, Freight Traffic Manager, Texas and New Orleans Railroad, referred occasionally to the appellee's Port Arthur refinery in the course of his extended examination. (R. 269)

The only exhibits received in evidence by the Commission relating particularly to the Port Arthur refinery of the Gulf Refining Company are the following:

Exhibit No. A-46, map showing the tracks and whole refinery area at the Port Arthur refinery. (R. 393)

Exhibit No. A-47, statement of loaded cars interchanged, and average cost per car by months from April, 1924, through April, 1932. (R. 393)

Exhibits Nos. A-48, A-49 and A-50, being copies of letters passing between officials of the Kansas City Southern and appellee's General Traffic Manager. (R. 394, 5, 6)

Exhibit No. A-116, cost statement and blueprint of tracks of appellee's Port Arthur refinery. (R. 438)

Relating to conditions at other Texas refineries and therefore relating indirectly to the general situation affecting the Port Arthur refinery is the testimony of various witnesses taken at the same session. (R. 253-331)

ANSWERS OF RESPONDENT CARRIERS.

Both of the carriers serving appellee's refinery were named as defendants in the bill of complaint and filed their answers thereto, in substantially the same language as the answers filed in the other cases, including No. 690, from which we have quoted on page 153, *supra*.

These answers constitute broad admissions by the railroad companies, amply sustained by the testimony of

their witnesses before the Commission, that their duty under the freight rates extends to the placement of cars at the loading and unloading points in this refinery.

CONTENTIONS IN BRIEF FOR APPELLANTS.

The individual suit of Gulf Refining Company is discussed on pages 108 to 119 of the brief for appellants. The matter is presented as though it had never been passed on by the District Court; and their contention that the Commission's order should be sustained is based upon a review of the report with various assertions as to the physical facts and the most meager of references to the record.

Counsel for appellants, in sweeping aside the testimony of railroad operating and traffic witnesses as to the extent of the obligation assumed by the carriers under the rates, make this interesting admission, p. 114:

> "The testimony includes, it is true, certain conclusions and opinions of the witnesses as experts, to the greater part of which the Commission gave no weight."

In point of fact, the Commission gave very little weight to any of the testimony as to these individual industrial plants and the court below so found.

The brief for appellants contains no citations of particular evidence of violations of the law or which would indicate that the court below erred in setting aside the Commission's order.

The Commission's conclusions are not supported by substantial evidence.

It will be observed that in the course of other supplemental reports dealing with other industries, there are many statements of facts appearing to indicate difficul-

ties or impediments of a nature not referred to in this report dealing with the appellee's refinery.

On the other hand, it is quite noticeable that the Twenty-first Supplemental Report goes into considerable more detail in its statement of physical facts than do some of the other supplemental reports, notably that dealing with The Texas Company, Houston refinery, involved in No. 530, 209 I. C. C. 767. None of the details of statement appearing in the report as to the appellee's Port Arthur refinery tend to support a finding that there exists any condition of interruption or interference and that therefore the practice of the carriers is gratuitous, if we disregard the conclusions stated in the report and for which there is no supporting evidence.

There are no less than *ten features* of the statements in the Commission's report which we believe are either unsupported by evidence or immaterial in and of themselves as evidentiary facts tending to support the Commission's conclusions, and which we shall briefly review.

They will be found in the short paragraph of four lines on page 759 of the reported decision (R. 643) and the very long paragraph on pages 759 and 760 which precedes the final paragraph of formal findings. (R. 644) We will discuss these paragraphs in some detail.

ALLOWANCE GRANTED IN RECOGNITION OF COMMON CARRIER DUTY.

1. The short paragraph, (R. 643), to which we have just referred, is a serious misstatement of an erroneous conclusion not justified by anything in the record:

> "The record is convincing that due to the competitive situation as between the respondent carriers little, if any, consideration was given by either to

its common-carrier obligations under the line-haul rates when granting this allowance."

We fear the Commissioners did not have their attention called by their assistants to the true facts of the inception of this allowance and that consequently *suspicion* has been allowed to replace *judgment* in reaching this conclusion. The references in other paragraphs of the report make it appear that probably this statement that "The record is convincing" is founded entirely on a statement in a letter written by the Vice President of the Kansas City Southern to the traffic manager of the Gulf Refining Company. (R. 394) By their questions at the hearing, the Commission's staff emphasized the idea expressed in the first sentences in the first and second paragraphs of this letter, reading:

> "I have just learned that Southern Pacific Company has negotiated with Magnolia Petroleum Company at Chaison, Texas, whereby Southern Pacific Company will allow Magnolia Petroleum Company an allowance per loaded car. * * *
>
> "We feel that we will be compelled to meet the action of Southern Pacific Company at Chaison and will want to treat your company equally as well as we do Magnolia Petroleum Company although the service might not be exactly the same in both instances. * * *"

There are two features of this letter which are very significant but which are ignored in the Commission's decision. The *first* is the date, April 30, 1923. The uncontradicted testimony of record is that the executives of the Gulf Refining Company had conferred with the Kansas City Southern a year earlier than that, in May, 1922, with a view to arranging for compensation for spotting service. (R. 260) Furthermore, the Interstate Commerce Commission under date of October 28, 1922,

had indicated its approval of the allowance to the Magnolia Company (Exhibit No. A-73, R. 397).

The *second* feature of the letter is its quotation from the statement of the Secretary of the Commission with reference to the allowance to the Magnolia Company:

> "it is not seen that that basis would result in a violation of the law. This statement is predicated on the idea that the allowance will be represented by actual service performed during the period covered by the allowance. It will be necessary that the provision for the allowance be published in a tariff and filed with the Commission."

The Commission ignored the statement made by the carrier in the last paragraph of the vice president's subsequent letter dated February 13, 1924, put in evidence by the Commission's Attorney, as Exhibit No. A-50, R. 396. This paragraph reads:

> "Our operating officials feel that to pay any more than the amount suggested would cause them to give serious consideration to handling the business with our own power to and from your loading and unloading facilities."

The plain meaning is that the operating officers of the Kansas City Southern thought that they ought to perform the service with their own engines and crews, unless they could employ the refinery to do that work for the proffered allowance of 90 cents against the estimated cost of more than $1.00. If the carrier considered performing the work with its own engines and crews, patently this would have been in recognition of "its common carrier obligations under the line-haul rates."

Perhaps a sentence can be picked out here and there from the oral testimony, isolated from context, which might suggest that the carriers did not constantly discuss and invariably mention the question of their com-

mon carrier obligation. But the above references disprove that "the record is convincing" that they did not consider the extent of their common carrier obligation in all that was done.

THE COMMISSION'S GENERAL CONCLUSIONS.

The long paragraph (R. 643, 4) which precedes the formal findings contains nine features of statement which we shall discuss briefly. We quote that paragraph in full, for convenience of discussion and so that each sentence may be judged in connection with its context. In quoting, as follows, we have interpolated in brackets the numbers used in our paragraphs of discussion:

> "As pointed out above (2), at no time has the Kansas City Southern or the Texas & New Orleans been able to reach all the spotting locations in the plant except by the use of each other's tracks, and (3) it must be recalled that the enlarged plant now contains a large number of spotting locations which were not in use when respondent carriers were performing a part of the service. (5) The testimony indicates that when the respondent carriers were performing part of the switching service within the Gulf Company property there was no serious interference between the industrial locomotives and those operated by respondent carriers. (6) At that time there was no proper division as between the spotting service, and the intraplant switching and strictly industrial service, the two services being conducted on a reciprocal basis as between the respondent carriers and the Gulf Company. (4) However, it appears that as the plant was enlarged, the Gulf Company, for its own convenience, relieved the respondent carriers from performing any service beyond the interchange points previously described. In a letter from the Kansas City Southern to the Gulf Company in connection with that carrier's offer to make an allowance, (7) it was indicated that, if the Kansas City Southern should attempt to perform the work within the Gulf Company plant, undoubtedly interference

with industrial operations would result. (8) Respondents are under no legal obligation to perform spotting solely at the convenience of the oil company. *Pittsburgh Forge & Iron Co.* v. *Director General,* 59 I. C. C. 29. If the respondent carriers were to perform the spotting service for which they pay an allowance (9) such performance would require each of them to assign a locomotive to the plant to operate practically under the complete direction and control of the Gulf Company. Carriers are obligated under their line-haul rates to perform service only to a reasonably convenient point of interchange and are not obligated under such rates to perform plant service, or service under the direction and control of an industry. See *Terminal Allowance to St. Louis Coke & Iron Co.,* 85 I. C. C. 591; *Stewart Furnace Co.* v. *P. R. Co.,* 68 I. C. C. 528. By the allowance to the Gulf Company both respondent carriers provide a substantially greater service at the same rates than they furnished prior to the granting of the allowance, (10) and the effect of the allowance is a reduction in the line-haul rates as to which there was no question of reasonableness at the time the allowance was granted. See *American International Shipbuilding Corp.* v. *P. R. Co.,* 57 I. C. C. 90, 93. Necessarily a shipper whose line-haul rates are reduced by such means receives a preferential treatment in comparison with shippers generally."

SUPPOSED CONDITIONS IN PORT ARTHUR REFINERY.

In the second, third, and fourth paragraphs of the report, (R. 641, 2), the Commission describes the refining plant, the tracks, etc. In stating these facts and in expressing its conclusions in the long paragraph just quoted, the Commission apparently regards this as *a complicated situation,* where *too much service* is performed by the industry engines, so that it would not be proper to charge the carriers with the cost thereof. This is the sole basis upon which it was concluded that the carrier *could* not lawfully perform the service.

On the other hand, in the 24th supplemental report, dealing with the Houston refinery of The Texas Company, (R. 605), the Commission apparently regards the service as so very simple that *too little* is done by the refinery to warrant compensation by the carriers!

The mere fact that the track layout in appellee's refinery at Port Arthur may be thought to be complicated, is not at all controlling of its right to have the cars spotted at loading and unloading points under the freight rate, according to the Commission's own prior decision in *The Car Spotting Case, supra.*

2. The fact is correctly stated, that:

> "at no time has the Kansas City Southern or the Texas & New Orleans been able to reach all the spotting locations in the plant except by the use of each other's tracks."

but the condition mentioned has no materiality to the question of the extent of the carrier's obligation. The Interstate Commerce Act may be read line by line without discovering any inhibition on the use by one carrier of the tracks of another carrier in order to reach an industry or to perform a service of transportation. Section 1 of the Act, in paragraph (3), makes the ownership of the tracks or facilities a wholly immaterial circumstance.

The report does not suggest that this circumstance involves a violation of law, or of fair and square dealing among the parties. It is merely "thrown in."

3. The further statement in the same paragraph of the report likewise is entirely immaterial:

> "it must be recalled that the enlarged plant now contains a large number of spotting locations which were not in use when respondent carriers were performing a part of the service."

The fact is perfectly true; and it represents an apparent effort to get away from the very important fact that the carriers formerly performed the spotting services at this refinery, which is evidence that they would be able to do so again and that they consider such service a part of their assumed obligation under the freight rates. Taking this statement as true and as constituting a distinct fact, there is nothing in it which tends to establish that the service performed by the industry is not a service of transportation or that the allowance is for any reason improper.

4. The further statement in the report which appellants reiterate in their brief, p. 112, that

> "it appears that as the plant was enlarged, the Gulf Company, for its own convenience, relieved the respondent carriers from performing any service beyond the interchange points previously described."

is untrue and not supported by any evidence or justified by anything appearing in the testimony.

This statement is at best a pure deduction. It does not rest upon specific testimony. It is an unfair statement if intended to mean that as a matter of law and of right the appellee agreed that the carriers were no longer under any duty of performing the conventional spotting services in this refinery or that the carriers were of that belief or took the position that such was not their obligation.

AS TO THE MATTER OF INTERFERENCE.

5. The report recognizes that when the respondent carriers were performing spotting service at this refinery, they encountered no interruption; but it is predicted, subsequently in the same paragraph, that certain interference would occur if the carriers attempted to do the

spotting work under present conditions. *First,* we read the Commission's statement, which is partially correct:

> "The testimony indicates that when the respondent carriers were performing part of the switching service within the Gulf Company property there was no serious interference between the industrial locomotives and those operated by respondent carriers."

This is a half-statement of a matter where the appellee is entitled to the benefit of the full statement, which would be that according to the evidence the carriers performed the conventional spotting services at this refinery of placing cars for loading and unloading. (R. 252)

6. The further statement, which follows the sentence last quoted, is not supported by evidence:

> "At the time there was no proper division as between the spotting service, and the intraplant switching and strictly industrial service, the two services being conducted on a reciprocal basis as between the respondent carriers and the Gulf Company."

Since this statement refers to conditions no longer existing and to an arrangement long since discontinued, it is probably not important to discuss in detail the evidence bearing on the foregoing statement. We surmise that what the Commission means to say, if emphasis may be supplied, is simply that the parties failed to make that careful distinction, which is implied in the words "no proper division," between the spotting services and plant services. They cooperated in doing the work at this refinery in an efficient and economical manner, the industry doing some work for the carriers and the carriers in return doing some work for the industry. If so, and if that was improper, it was back in 1923 and prior thereto and has no bearing on the propriety of the prac-

tices and arrangement of the past several years, condemned by the Commission's order.

7. The report contains a further sentence on this matter of *interference* which is contrary to the evidence as a whole and on its face rests upon a single item in the testimony. It does not mean the existence of such interference as is contemplated by the Commission's original report, 209 I. C. C. 11, 44. The sentence reads:

> "In a letter from the Kansas City Southern to the Gulf Company in connection with that carrier's offer to make an allowance, it was indicated that, if the Kansas City Southern should attempt to perform the work within the Gulf Company plant, undoubtedly interference with industrial operations would result."

Appellants again refer to this letter in their brief, p. 116, and draw the same inference from it. It will be observed, however, that the letter did not indicate that industrial operations would interfere with and prevent the carriers' performance of the spotting service, if undertaken with its own locomotives, the *important converse* of what the Commission said.

This statement of alleged interference appears in the letter offered by the Commission's Attorney as Exhibit No. A-50 from which we have already quoted, in part. The following is the paragraph regarding interference (R. 396):

> "I think you will agree with me also that it would be undesirable for our company to attempt to perform this work within your plant as it would undoubtedly interfere with your own work, consequently all circumstances in connection with the operation should be considered, and we both should be careful not to give or receive an allowance which could not be justified by the cost of the service."

Appellants quote only the first half of this sentence, which we submit is unfair, and the statement as a whole

completely refutes their statement that the allowance was made with little consideration given to cost of service.

Furthermore, the record instead of establishing that interference would be involved, of the type referred to in the Commission's report, quite clearly shows the opposite.

The testimony of the several witnesses, without conflict or contradiction, fairly requires an affirmative finding that there would be no interference, if the carriers performed the spotting service. We will discuss this feature below.

SPOTTING NOT DONE SOLELY AT INDUSTRY'S CONVENIENCE.

8. The further statement is made in the long paragraph of the report which precedes the formal findings:

> "Respondents are under no legal obligation to perform spotting solely at the convenience of the oil company."

Appellee does not challenge that statement or question its correctness but submits that it is wholly irrelevant to anything before the Commission or before this court.

The appellee does not contend, and we know of no other industrial company which has ever contended, that the carriers are under an obligation to perform spotting services solely at the convenience of the consignor or consignee, whether it be an industry with a system of tracks or a patron served by a team track or single short side-track.

There is nothing being done at the Port Arthur refinery and nothing proposed to be done at that refinery, under any circumstances, *solely at the convenience of the oil company.*

That statement in this report, found in others of the supplemental reports, rests upon a false idea which the Commission entertains that an arrangement which is *mutually convenient*, both to the carrier and to the industry, is necessarily unlawful because of the mere fact of advantage to the industry. The advantage must be all to the carrier! The courts have repeatedly held otherwise, 222 U. S. 42, 47; 277 Fed. 538, 542.

SUPPOSED NECESSITY FOR CONTINUOUS SERVICE.

9. The Commission apparently assumes from the record that the necessities of this plant would require continuous all-day service by switching locomotives and therefore must be beyond the limit of any service reasonably covered by the established freight rates. The report states, and appellants place apparent reliance upon the matter, in brief:

> "If the respondent carriers were to perform the spotting service for which they pay an allowance such performance would require each of them to assign a locomotive to the plant to operate practically under the complete direction and control of the Gulf Company."

This statement is partially sustained by the record, to the extent that it indicates that a locomotive would have to be assigned to the plant to operate continuously. That would be necessary *because of the large volume of the inbound and outbound traffic* of this plant. It is true that there ought to be coordination in the work in this plant. But there is no evidence whatever that a carrier-assigned locomotive would have to operate "practically under the complete direction and control of the Gulf Company."

On this matter of assigned locomotives, the record before the Commission contains literally hundreds of

illustrations of industries where the railroads are performing the spotting services and where, in normal times, they have one, two, or even a dozen locomotives regularly assigned to do the spotting work at the particular industry, as required by the volume of its business.

The statement that a carrier assigned engine would have to operate under plant control is not justified by any evidence. We quote the testimony of the plant yardmaster, R. L. Jones, on this point:

> "Q. Assuming that the railroad would again perform the service that the Gulf Refining Company performs, would there be any difficulty, do you know of any difficulty that they would have in bringing in a load to any designated spot or pulling out carloads—by that I mean would they have to perform any additional service other than placing the car or pulling the car from the refinery?
>
> A. Well, I think not, if they had a certain schedule to come in. I would keep our line clear and keep the cars out of the way and make the arrangement for them to come.
>
> Q. So you do not anticipate that there would be any difficulty in the railroad again performing the service as they did prior to the date of our allowance?
>
> A. No, sir, I do not." (Or. Tr. 5423)

This statement indicates absence of any condition of threatened interference and it does not indicate that the railroad locomotives would have to operate under plant control. That this would not be necessary or expected by the industry is indicated by the further testimony of the same witness, (R. 264).

ALLOWANCE DOES NOT ABATE THE MEASURE OF THE RATES.

10. The report states in effect that the granting of the allowance resulted in an abatement of the freight rates which were then in effect and concerning which there had been no question of reasonableness. This statement is particularly unfair in ignoring the true facts of the situation. These allowances were established in 1925-1927. The entire schedules of petroleum rates from all of these southern refineries were broadly reviewed and a new structure of rates was set up and prescribed by the Commission subsequent to the establishment of these allowances. (*General Petroleum Investigation,* 171 I. C. C. 286; also 171 I. C. C. 381, decided January, 1931). Those rates were prescribed in contemplation of the carriers assumed obligation of taking the cars to and from the loading and unloading tracks in refineries and in harmony with the rule of the Consolidated Classification.

The Texas Company.

(Port Arthur and Port Neches)

No. 718 below; No. 530 on appeal.

Appellee has three plants in the Port Arthur district; the Asphalt Plant, located on the Neches River at Port Neches, Texas, (between Port Arthur and Beaumont, Texas); and the Island Plant at Port Arthur, Texas, both of which are served exclusively by the Texarkana & Fort Smith Railway Company, part of the Kansas City Southern Railway Company. The third is the Refinery, also located at Port Arthur and served by the Kansas City Southern and Texas and New Orleans Railroad Company.

These industrial plants are dealt with in the 44th supplemental report. (R. 665)

The allowances condemned by the Commission are published in tariffs of language practically identical to those cited in connection with the Houston refinery of the Texas Company. See p. 188, also p. 151, *supra*. The allowances are 90 cents per loaded car at the Island Plant and the Port Arthur refinery and $1.00 per loaded car at the Port Neches Plant.

ANSWERS FILED BY CARRIER DEFENDANTS.

The carriers serving appellee's three plants in the Port Arthur district were named as defendants in the bill of complaint and filed their several answers thereto. These answers are in substantially the same terms as those filed in the bill of complaint of this appellee under No. 692 below, from which we have quoted at p. 190, *supra*. The admission of these answers that the carrier's obligation, assumed under its freight rate, extends to the spotting of the cars is amply sustained by the testimony herein.

THE RECORD RELATING TO APPELLEE'S PORT ARTHUR AND PORT NECHES PLANTS.

The record particularly relating to the three plants of appellee at Port Arthur and Port Neches, Texas, comprises the testimony of the following witnesses only:

Charles Ervin, Assistant Manager, Traffic Division of The Texas Company. (R. 317)

J. M. Fleming, Superintendent of Transportation of this company for the Southwestern District. (R. 318)

H. M. Snyder, with this company at Port Arthur. (R. 315)

C. E. Nicholson, Chief Clerk, Port Neches refinery of this company. (R. 314)

The only exhibits received in evidence by the Commission relating particularly to these plants were:

No. A-79, being a blueprint map of the tracks at the Port Neches works. (R. 404)

No. A-81, being a blueprint map of the tracks at the so-called Port Arthur Terminal, otherwise known as the Island Plant. (R. 404)

No. A-82, being a blueprint map of the Port Arthur Works or refinery. (R. 404)

No. A-84, being a letter dated April 30, 1923, from the Vice President of the Kansas City Southern to The Texas Company. (R. 406)

No. A-85, a statement of switching costs at the Port Arthur terminal. (R. 407)

No. A-86, a like statement of switching costs at the Port Neches works. (R. 408)

No. A-117, a cost statement, with blueprint map relating to the Port Arthur refinery, reflecting the cost study made by the Kansas City Southern. (R. 441-2)

No. A-118, a cost statement, with blueprint map relating to the Island Plant, reflecting the cost study made by the same carrier. (R. 443-4)

No. A-119, a cost statement, with blueprint map relating to the Asphalt Plant, Port Neches, reflecting the cost study made by the two carriers. (R. 445-6)

The evidence of officials of the Kansas City Southern Railway System regarding the Texas refineries was received at a later session of the Commission held in Kansas City on March 23, 1932. The following carrier witnesses testified, more particularly as regards the situation in the Port Arthur district:

W. N. Deramus, General Manager, Kansas City Southern Railway. (R. 331)

H. A. Weaver, Vice-President in charge of traffic, same carrier. (R. 343)

J. O. Hamilton, General Freight Agent, Texarkana & Fort Smith Railway. (R. 347)

C. E. Johnston, President, Kansas City Southern Railway. (R. 349)

Erroneous statements of fact respecting Asphalt Plant.

There are various errors in the Commission's statements of fact, some of the statements being unsupported by any substantial testimony. Others of the statements, when analyzed, will be seen wholly immaterial or irrelevant to any finding of unlawfulness in the allowances.

GENERAL CONDITIONS AT ASPHALT PLANT.

The supplemental report describes, first, the conditions at the Asphalt Plant, known as the Port Neches Plant and which is situated on the Neches River, midway between the cities of Beaumont and Port Arthur.

Two maps of this plant are in evidence, as Exhibits Nos. A-79 and A-119. (R. 404, 446)

The report (R. 666) states, *our italic:*

> "*The track layout within the plant is complicated,* there being a number of ladder tracks as well as other tracks, some of which lead therefrom, and other tracks scattered throughout the plant. The curvature of the tracks within the plant ranges from 10 degrees, 52 minutes, to 44 degrees, 8 minutes. The curves from the lead to the ladder tracks in the majority of instances are either of 28 degrees or 44 degrees, 8 minutes, and it is necessary in many cases in reaching the points of loading and unloading on other tracks to pass over these ladder tracks."

The foregoing statement does not tend to support the formal findings or the order in this case. The most that can be claimed for these statements is that they are intended to describe "a complex situation" where it might be anticipated *or assumed* there would be some difficulties in performing placement services if the carrier was to do the work with its own power. There are two answers to any such assumption:

First, these facts are of no significance in the light of the Commission's own expression in *Car Spotting Charges,* 34 I. C. C. 609, 616, quoted on p. 63, *supra.*

Second, there is no testimony to indicate any physical conditions which would prevent the carrier, with its own locomotive, from performing the spotting services at this plant, the same as at other plants. The evidence is that the carrier could do the work, without interference. Witness Nicholson so testified, as to this plant. (R. 315) Witness W. N. Deramus, General Manager of the Kansas City Southern, so testified. (R. 336) Indeed, he testified that previous to the granting of the allowance, the Kansas City Southern did the placement work at this plant. (R. 341)

The testimony of Mr. Nicholson, to which we have just referred, reads as follows (R. 315):

> "There is nothing about the physical condition of the track at Port Neches, as to weight of rail or other transportation considerations, that would prevent the carriers' power from performing the service our power performs. They could do it the same as we do it. There is nothing about the industrial operation, such as shifting cars in intraplant service that would interfere with the spotting service by the Texarkana and Fort Smith. The operations of the carrier in the plant could be so anticipated that we ought to avoid conflict in there, that is, avoid stopping the engine and avoid blocking their work."

Witness Deramus gave the following very important testimony concerning this plant (R. 342):

> "The Kansas City Southern performed the switching at The Texas Company Port Neches plant up until about 1922 or 1923, prior to the establishment of the allowance. The Port Neches plant had its own engine which confined its activities largely to the handling of intraplant cars and particularly to the movement of traffic of what we call the Asphalt Warehouse, their manufacturing plant, and the docks along the Neches River. It was of some considerable importance to us to work the matter out with The Texas Company so they could look after our switching in that plant. Port Neches is quite some distance from our center of activities. Our yard at Port Arthur is about 11 miles from the plant and we had some difficulty at that time in taking care of all the work in Port Neches with one engine without running into overtime. Our switch engine had to leave Port Arthur in the morning and run to Port Neches and perform the work at The Texas plant and return to our yard. We were not always able to make that trip and perform the service at Port Neches. Because of the peculiar condition at Port Neches, I am not sure but what we urged The Texas Company to take over that work."

In a paragraph of the report subsequent to the one from which we have quoted, appears the further statement (R. 667):

> "An examination of a blue print of the plant's tracks filed as an exhibit, however, shows that *because of the complicated layout* it would be practically impossible for the respondent to perform service thereover *without the assignment of a locomotive of a special design* to negotiate the curves encountered in reaching the points of loading and unloading. Such engine would have to be available practically at all times to perform the service to meet the needs of the plant."

It is preposterous to say that a glance at a blueprint proves the impossibility of a standard switching engine operating over the tracks in this plant. We deny that such conclusion can be reached from looking at a map. There is no evidence, either in oral testimony or otherwise, (including what appears on the face of the map), to indicate that standard switching engines of the type employed by the carriers in the Beaumont-Port Arthur area, could not and have not operated within this plant, in the placement of cars for loading and unloading. Specifically there is no evidence that the engines used by the Port Neches refinery are not of a standard switching type.

FORMER PERFORMANCE OF SPOTTING BY THE CARRIER.

The supplemental report is erroneous in its partial, incomplete and misleading statement respecting the manner of performance of spotting services at the Asphalt Plant, prior to the time of the allowance. The first statement made by the Commission (R: 666) is with regard to the testimony of a witness *who did not know*, Mr. Nicholson:

> "Witness for the industry testified that the industry has performed the spotting service during his service with the company at Port Neches, approximately 12 years prior to the hearing. *He did not know* how or by whom the service was performed prior to that time."

This undoubtedly refers to the testimony of the first witness employed by the Texas Company, C. E. Nicholson, Chief Clerk at the Port Neches refinery. The record reads as follows (Or. Tr. 5735):

> "Q. Did the connecting carrier at one time perform the service at your Port Neches plant?
> A. They have not during my time at Port Neches,

to my knowledge. I assume you mean by performing the service, spotting the loads and moving them from the plant. They have not done that during my time.

Q. Do you know whether they did before?

A. *I have heard that they did* but I know nothing about that service." (*Our ital.*)

Following the paragraph last quoted from the report appears the following paragraph referring to the testimony of Witness J. M. Fleming:

"Another witness for the industry testified that the K. C. S. performed some of the spotting service at this plant up to the time the allowance was granted, but the extent thereof is not known."

Appellants in their brief evidently accept these misstatements as justification for their remark, at page 121 thereof, that the testimony of one employee contradicts that of another as to whether prior to 1924 the industry was doing all its spotting. Such unfair deductions are not justified by the record and could only be made in an attempt to discredit the testimony of reliable men. They would not warrant reply, as the matter is in itself immaterial, but for their very flagrance.

The statement last quoted is not a fair statement of his testimony which the court will find of record (R. 320):

"At our Port Neches plant we never did perform all of the spotting service until we received an allowance. Prior to receiving an allowance the railroads performed part of the spotting service for about ten years."

The report proceeds with the following statement, dealing with the testimony of Witness Deramus (R. 667):

"The General Manager of the K. C. S. testified that the service performed by the industry's power up to the time the allowance was granted was confined al-

> most, if not exclusively, to moving cars from one point to another within the plant and that the spotting service was taken over by the industry at the time the allowance became effective."

A fair statement of the facts, as required by the testimony of the several witnesses, is that before the allowance was granted the spotting services were *usually performed* at this industry by railroad power and crews, the industry *occasionally* helping out in a voluntary way in the spotting of particular cars. In other words, the flavor of the report is that before the allowance was granted, the industry did much of the work itself without compensation, so that the carrier was paying for something that it did not need to pay for. If that were true, it would be immaterial, in our judgment, for paragraph (13) of section 15 of the Act contemplates that shippers may be paid for furnishing facilities and performing the services for the carriers; and there is nothing in the statute or in the decisions that holds that by failing to exact compensation for a time, the industry is estopped to seek and obtain such compensation.[29]

SUPPOSED NEED FOR CONTINUOUS SERVICE AT ASPHALT PLANT.

In further reference to the conditions at the Asphalt Plant, it seems in order to comment on the following statement which is the last sentence of the report (R. 667) dealing specifically with that plant:

> "Such engine would have to be available practically at all times to perform the service to meet the needs of the plant."

First, the record contains no evidence tending to show that the requirements and needs of this refinery are any

[29] In fact, the Commission has repeatedly ordered or approved section 15 allowance where prior to the grant thereof the industry had done the work without pay. For cases, see p. 17, *supra*.

different or more exacting in the way of service by the railroad than the requirements and needs of other refineries in general, which needs the carriers are fulfilling as a matter of course. For illustration, there is no evidence tending to suggest that the requirements of The Texas Company exceed the requirements of the Norco refinery, where all the service is done by the carrier engines and where, in normal times, two railroad switch engines were assigned and *constantly* employed. (R. 183)

Second, the record contains the affirmative evidence that the allowance to The Texas Company at each of these plants was made after a cost study, based upon observation of the actual work performed during the representative period and under the regular formula adopted by the carriers. (R. 441, 443, 445)

Erroneous statements respecting Island Plant.

The so-called Island Plant at Port Arthur, sometimes referred to in the record as the Port Arthur Terminal is served only by the Kansas City Southern, formerly Texarkana & Fort Smith Railway and the allowance received is 90 cents per car.

Two paragraphs of the Commission's report (R. 667) are devoted to conditions at this plant; and the Court will readily observe that there is really nothing in these paragraphs that tends to show the service performed by the appellee is not a transportation service or that the allowance is in any wise unlawful.

SIMPLE CONDITIONS IN ISLAND PLANT.

In the first place, quite in contrast with the paragraph which we have already quoted, wherein the Comission states that the track layout in the Asphalt Plant is com-

plicated and complex, it will be observed there is nothing claimed to be complicated about the simple layout at the Island Plant which the Commission describes as follows (R. 667):

> "This plant is served by the K. C. S. Traffic is received from and delivered to the plant on a series of tracks north of the plant from which they are moved by plant power to the various points of loading and unloading within the plant, of which there are 30. There are 1.34 miles of 60-pound rail and .35 miles of 80-pound rail in the plant."

The track layout at the Island Plant, thus referred to, is shown on blueprint map received as Exhibit No. A-81 (Rec. 404), and Map Exhibit No. A-118. (R. 444)

The Commission makes no attempt to distinguish condemnation of the allowance at the Port Neches asphalt plant, because "the tracks are complicated" and like condemnation at the Island Plant, Port Arthur, despite the fact that there are *no complications* of track layout and service.

FORMER PERFORMANCE OF SPOTTING BY CARRIER.

The second paragraph of the report in the section dealing with the Island Plant, contains this unfair statement (R. 668):

> "Witness for the industry who had been connected with this particular plant for 12 years prior to the hearing, testified that to the best of his knowledge the respondent had never performed spotting service within the plant."

This reference is undoubtedly to the testimony of witness H. M. Snyder, who said that he had been with The Texas Company at Port Arthur, where it has two plants, for about twelve years. (R. 315) In the cross fire of his examination, first by one attorney and then

another and the presiding Director of Service interposing, he testified concerning both of these plants. On Or. Tr. 5747 (R. 316), he was asked and answered:

"Q. Did the Kansas City Southern ever perform the spotting service at your plant?

A. Not to my knowledge.

Q. It has always been performed by your company?

A. So far as I recall, yes, sir."

In and of themselves, these answers would seem to confirm the statement in the report. Unfortunately, however, the allowance was established in 1924 and the recollection of the witness extended back only to 1926. (R. 316) Of course the industry had been doing the work, but *for an allowance.*

The statement quoted is contrary to the definite testimony of witness Fleming, employed by The Texas Company (R. 320) and of witness Deramus, General Manager of the Kansas City Southern. (Or. Tr. 6119; R. 391) The latter witness said:

"Q. We will pass on, now, to the island plant of The Texas Company at Port Arthur, sometime spoken of as the terminal. If the same questions were asked you with reference to that operation and that industry as have been asked you in connection with the Gulf Refining Company, would your answers be the same?

A. Yes, sir.

Q. Do you happen to remember how long the Kansas City Southern, with its own power, has performed the service on the industrial tracks of that plant?

A. I believe we performed all of the service within that plant up pretty close to the time that the allowance was made.

Q. Would that be within a year?

A. Yes; or perhaps less."

The statement incorporated in the report by someone on the Commission's staff, referring to the testimony of

"one witness for the industry," is directly contradicted by the affirmative statement of witness J. M. Fleming, who testified (R. 320):

> "At our Port Terminal plant, the railroads performed the spotting prior to granting an allowance and we acted in a sort of supplemental way in certain instances but never completely performed the spotting service. For instance, if the railroad happened to leave a car at the wrong location, we would move it over to the right one. The T. & S. F. performed the entire service of switching for about five or six years."

In the light of the foregoing testimony, the sentence last quoted from the report of the Commission is clearly erroneous.

MEASURE OF SERVICE REQUIRED BY THE INDUSTRY.

There are two statements in the two paragraphs devoted to the Island Plant which refer to the manner in which the spotting is done and the proposed need of the industry in the way of placement service, which require comment.

1. The report states (R. 668):

> "Cars are taken from the interchange track and spotted whenever it is convenient for the plant to handle them."

That may be so; but does anyone suppose that where a plant is performing placement services as agent for the carrier, it ought to do so in a manner not particularly convenient to itself? The fact that the work can be done at the reasonable convenience of the industry and to its reasonable advantage, although it receives from the carrier less than the cost for doing the work and less than the carrier's expense if it did the work itself, makes for *mutuality* of advantage in

the entire arrangement. Such mutuality is to be commended and is favored by the law, although apparently not by the Commission.[30]

2. The other statement in the report (R. 668) concerning service in the Island Plant is as follows:

> "The total engine time divided by the number of days shows that the engine was in service an average of approximately 11¼ hours per day, and no doubt the handling of the loaded and the empty cars was between the interchange tracks and the points of loading and unloading within the plant at different times during the day *so that if the carrier were called upon to perform the service* the same as obtained by the industry with its own power, *it would necessitate the assignment of an engine* to the plant to be used to meet the industry's needs and desires."

The evidence does not justify the conclusion that if the railroad were to perform the spotting service it would have to assign a special engine for that purpose. There is no evidence to that effect. (Of course, if done *the same* as done by the industry, an engine would have to be there all the time!) But if that were the fact, it would be immaterial for the reasons hereinabove suggested in our discussion of the conditions at the Asphalt Plant, where the Commission also said it would be necessary to assign a special engine if the carrier did the work.

Erroneous statements respecting Texas Company's Port Arthur refinery.

Four long paragraphs are devoted to a description of the facts at the refinery at Port Arthur (R. 668-9); and the statements are partial, incomplete, and colored to suit the Commission's conclusion. Even so, we submit there are no statements made of facts establishing that

[30]See authorities, p. 22.

the tariffs of the two carriers providing for the allowance at this refinery are wrong when they describe the service performed as a transportation service and as one which they are obligated to render; or to prove that there is anything unlawful in the practice at this refinery.

GENERAL CONDITIONS AT PORT ARTHUR REFINERY.

The track layout at the Port Arthur refinery is depicted on map Exhibit Nos. A-82 (R. 404) and A-117. (R. 442)

The report does not state, (as it does in connection with the Asphalt Plant) that an examination of the blueprint filed as an exhibit would show that the track layout is complicated or would show a complicated situation. But the first paragraph of description of the refinery, which is served both by the Kansas City Southern and by the Texas and New Orleans Railroad, would indicate that the tracks are much more extensive than at the Island Plant. There is nothing to suggest, however, that the layout at this refinery is any different than at Norco, Louisiana, and at the Sinclair and Shell plants in both the Houston and New Orleans districts, where the carriers do all the placement services, without charge.

We ask attention to the following statement in the proposed report (R. 669) regarding this Port Arthur refinery:

> "Cars are removed from the interchange tracks used by both the K. C. S. and T. & N. O. under a schedule *which has been worked out to the mutual interest of the switching crews and the industry*, that is, the cars are moved and spotted within the plant in order to meet the plant's convenience and needs." (*Our ital.*)

The first part of this statement is correct, *and favorable to the appellee's view of the case.*

The second part of the statement is erroneous and not supported by the testimony.

In other words, it is plainly a commendable feature of this arrangement that the work has been planned to the mutual interest and convenience of the switching crews, (which means the railroads) and the industry. But it is not true that the cars are moved within the plant in a manner dictated solely by the industrial needs or convenience of the plant, if that is what the statement is intended to mean.

There is nothing in the evidence to justify any such conclusion. The general testimony of witness W. N. Deramus, General Manager of the Kansas City Southern, on the question of the carrier's obligation and of the custom of the carriers to perform all placement services under their line-haul rates, is very significant. (R. 337)

In the light of that testimony, the court will doubtless read with interest and understanding, the statement of Mr. Deramus with regard to the three plants of appellee served by his company in the Port Arthur district, and pertinent also to the other refineries receiving allowances from his company in that district. Mr. Deramus testified (R. 336):

> "I know of no reason why the railroad company could not go into any one of the plants and serve them completely in so far as carrier service is concerned, and also from an intra plant standpoint."

The Commission in its original report in these proceedings and in all of these supplemental reports, including the 44th, completely ignores the general testimony and broad statements of witness Deramus and other op-

erating and traffic officers of the carriers. It is particularly unfair to do this and then to turn around and take one isolated feature of specific statement of the witness such as that reflected in the following sentence in the supplemental report, concerning this Port Arthur refinery of appellee (R. 669):

> "The General Manager of the K. C. S. testified that formerly that company switched this plant, but as the plant grew and as the need for intraplant movements increased, the cost of that intraplant service performed by that respondent for account of the refinery increased in proportion to the increase of movement and it was for this reason that the Texas Company was prompted to put an engine in the plant, entirely from an economical standpoint, and that the plant locomotive gradually undertook the performance of the spotting service which was formerly performed by respondent."

There is some basis for this statement on R. 341. But the witness in his testimony made clear that these developments had been a matter of mutual economy and cooperation and he particularly testified:

> "Q. Did your company ever refuse to render service over there to your knowledge?
> A. Oh, no." (Or. Tr. 6121.)

As to the *intraplant service,* for which railroads always make a charge and which neither appellee nor any other industry claims the carriers are obliged to perform unless they are paid therefor, Mr. Deramus testified, (Or. Tr. 6121):

> "A. They elected to provide the engine there to handle their intraplant work as against paying us to handle it."

In the ensuing examination of the witness, the Court will notice considerable confusion, on the part of the

questioners, as between intraplant services and placements which are incidental to through transportation.

CONCLUSION.

The decision of the statutory court and the decrees entered in all of the underlying cases in both Districts should be affirmed.

Respectfully submitted,

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Chicago, March 19, 1938.

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SUPREME COURT OF THE UNITED STATES.

Nos. 514, 530.—October Term, 1937.

514

The United States of America and Interstate Commerce Commission, Appellants,
vs.
Pan American Petroleum Corporation, et al.

Appeal from the District Court of the United States for the Eastern District of Louisiana.

530

The United States of America and Interstate Commerce Commission, Appellants,
vs.
Humble Oil & Refining Company, et al.

Appeal from the District Court of the United States for the Southern District of Texas.

[April 25, 1938.]

Mr. Justice Roberts delivered the opinion of the Court.

These appeals are from decrees of specially constituted district courts, setting aside and enjoining the enforcement of orders of the Interstate Commerce Commission in nine cases which were consolidated for hearing and decided in a single opinion.[1] The orders of the Commission which were the subject of attack commanded the railroad or railroads serving industrial plants of the appellees to cease and desist from the payment of allowances for switching services performed by plant facilities. They resulted from a general report in which the Commission after investigation announced general conclusions respecting switching services by carriers in industrial plants, and payment of allowances out of the line-haul rate to an industry performing the service,[2] and subsequent supplemental reports with respect to specific plants.[3] The Commission held that, in the circumstances disclosed at each of the plants under considera-

[1] 18 F. Supp. 624. A circuit judge and two district judges sat as a District Court for each of the districts to hear the cases.

[2] Ex parte No. 104, Practices of Carriers Affecting Operating Revenues or Expenses, Part II, Terminal Services, 209 I. C. C. 11.

[3] Mexican Petroleum Corporation of La. Inc. Terminal Allowance, 209 I. C. C. 94; Celotex Company Terminal Allowance, 209 I. C. C. 764; Great Southern Lumber Company-Bogalusa Paper Company Terminal Allowance, 209

tion, the carriers' obligation of delivery was fulfilled by placing or receiving cars on interchange tracks and that the moving and spotting of cars in the industries' plants formed no part of the service covered by the line-haul rate. It concluded that the practice of making an allowance out of the rate to the owner of the plant for the performance of the spotting service was unlawful and should be discontinued.

The appellees, in their complaints, asserted that in making its orders the Commission exceeded the powers conferred upon it by the Interstate Commerce Act. These contentions are the same as those considered in *United States* v. *American Sheet & Tin Plate Co.*, 301 U. S. 402, and are foreclosed by the decision therein.

The appellees charged that the Commission's findings and orders were not supported by substantial evidence. The District Court held with them upon this point. We have examined the record and are of opinion that in each case there is substantial evidence to support the Commission's findings. No useful purpose will be served by a detailed recital of the evidence and it must suffice to say that, while the conditions in the various plants differed, in all of the cases the Commission had before it maps exhibiting the character and extent of the plant trackage, its relation and accessibility to the main line tracks of the carriers concerned, and proofs as to the volume and nature of intra-plant car movements, the amount of engine service required and other relevant facts. The value and weight of the evidence given by railroad and plant executives, and the inferences to be drawn from it, were for the Commission. In some instances the inconvenience and delay to the carriers in performing plant services was more obvious than in others but we are unable to say that in any case the Commission's orders were not based upon substantial evidence. The orders should not have been set aside, and the decrees must be reversed.

Reversed.

Mr. Justice CARDOZO and Mr. Justice REED took no part in the consideration or decision of this case.

I. C. C. 793; Standard Oil Company of Louisiana Terminal Allowance, 209 I. C. C. 68; Humble Oil & Refining Co. Terminal Allowance, 209 I. C. C. 727; Magnolia Petroleum Company Terminal Allowance, 209 I. C. C. 93; Texas Company Terminal Allowance at Houston, Tex., 209 I. C. C. 767; Gulf Refining Company Terminal Allowance, 209 I. C. C. 756; Texas Company Terminal Allowances at Port Arthur, Texas, 213 I. C. C. 583.